



1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	CHRISTOPHER J. PAOLELLA, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	ANTHONY A. YANG, ESQ.	
7	On behalf of the Respondent	13
8	ORAL ARGUMENT OF	
9	JEFFREY S. BUCHOLTZ, ESQ.	
10	For amicus curiae in support	26
11	of the judgment below	
12	REBUTTAL ARGUMENT OF	
13	CHRISTOPHER J. PAOLELLA, ESQ.	
14	On behalf of the Petitioner	55
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 P R O C E E D I N G S

2 (10:25 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 first this morning in Case 11-10362, Millbrook v. United  
5 States.

6 Mr. Paolella.

7 ORAL ARGUMENT OF CHRISTOPHER J. PAOLELLA,  
8 FOR PETITIONER, APPOINTED BY THIS COURT

9 MR. PAOLELLA: Mr. Chief Justice, and may it  
10 please the Court:

11 The plain language of Section 2680(h) is law  
12 enforcement provides a waiver of sovereign immunity in  
13 clear, precise and unambiguous terms. It extends the  
14 waiver to any claim for one of the six enumerated torts  
15 committed by a Federal investigative or law enforcement  
16 officer acting within the scope of his or her  
17 employment.

18 And it defines investigative or law  
19 enforcement officer as any officer of the United States  
20 who is quote, "empowered by law," unquote, to carry out  
21 searches, seizures or arrests.

22 JUSTICE GINSBURG: Would that include, say,  
23 a meat -- a meat inspector? There is a wide range of  
24 Federal employees that have arrest or search or  
25 seizure --

1                   MR. PAOLELLA: The proviso doesn't any  
2 employee of the United States who is authorized to carry  
3 out a search, seizure, or arrest. It used the term "any  
4 officer of the United States." And I believe that the  
5 term "officer" carries some water here. If we look at a  
6 spectrum of individuals who have powers -- for example,  
7 to carry out searches -- we can envision on the one hand  
8 very traditional core of law enforcement officers.

9                   Let's take a DEA officer who can carry out  
10 arrests, do searches and seizures, is authorized to use  
11 force. At the other end of the spectrum, we have  
12 something like a meat inspector or an OSHA inspector,  
13 who may have a limited ability to carry out searches,  
14 but these are searches that are in really a law  
15 enforcement capacity -- an administrative capacity as  
16 opposed to a core law enforcement capacity.

17                  So the government raises the argument, and  
18 we think it's a plausible interpretation, that by using  
19 the term "officer" rather than any employee of the  
20 United States, that there was some limiting factor  
21 imported into the statute, thereby the statute's plain  
22 language.

23                  And I would trust my colleague from the  
24 Solicitor General's office to map the boundaries of  
25 that. I would say that in any case, a correctional

1 officer, who are the individuals who are involved here  
2 in committing the complained-of acts, certainly falls  
3 much closer to core law enforcement on that spectrum  
4 than to the administrative side.

5 JUSTICE KENNEDY: As a general matter, first  
6 in the States and then in the Federal Government, is a  
7 correctional officer or prison guard usually deemed to  
8 be a peace officer?

9 MR. PAOLELLA: The -- yes. In many States  
10 that use the term "peace officer" in the statutes  
11 defining a peace officer for things -- for example,  
12 authorizing the use of force or authorizing the carriage  
13 of weapons -- many States -- it's not uniform, but many  
14 States include correctional officers within that ambit.

15 The Federal Government typically does not  
16 use the term "peace officer" in its statutes, but if you  
17 look at Federal statutes that use the term "law  
18 enforcement officer," which is the very term that's used  
19 in subsection (h), many -- many of those other statutory  
20 schemes expressly include correctional officers. So,  
21 for example, for purposes of civil service pay, for  
22 purposes of death benefits, of retirement benefits.

23 JUSTICE SCALIA: That doesn't prove that  
24 they're officers. I mean, that's -- that's not the test  
25 for an officer, how much you're paid. The test is

1 whether you exercise significant authority under the  
2 laws of the United States. That's a pretty fuzzy line,  
3 but I'm not sure that a prison guard exercises  
4 significant authority under the laws of the United  
5 States.

6 MR. PAOLELLA: I would think in the context  
7 of the prison, it's hard to imagine how a prison guard  
8 could exercise any more authority than they do. In  
9 addition to their correctional function, prison  
10 correctional officers are essentially the police force  
11 for the prison.

12 They are charged with maintaining order, and  
13 they're charged with enforcing the laws of the United  
14 States within the confines of the prison, and indeed in  
15 some specified cases, outside the prison walls. For  
16 example, they are explicitly authorized under Section  
17 3050 of Title 18 of the U.S. Code not just to carry out  
18 arrests in prison for violations of Federal law, both by  
19 prisoners and visitors, but to carry out arrests outside  
20 the prison walls to prevent prisoner escapes or to  
21 prevent assaults on other law enforcement officers. So  
22 there's quite expressly an arrest authority granted to  
23 correctional officers. In addition, they have the power  
24 to search for contraband, both in the context of  
25 visitors to prison and prisoners themselves.

1 JUSTICE SOTOMAYOR: Counsel, you've argued  
2 something slightly different than I took from your  
3 briefs. Earlier, in response I think to  
4 Justice Ginsburg, you were queueing closer to the  
5 Solicitor General's position that this has to be limited  
6 in some way. And you said you'll let them establish the  
7 boundaries. I don't want to let them establish the  
8 boundaries.

9 I want you to tell me, is it criminal law  
10 enforcement agents, is it law enforcement agents with --  
11 acting -- as the Ninth Circuit says -- acting within a  
12 law enforcement activity? Because I am finding it hard  
13 to figure out why we shouldn't permit tort liability on  
14 an OSHA inspector, who, in inspecting whatever he or she  
15 is inspecting punches someone or does some intentional  
16 assaultive act, why they should be permitted to do that.  
17 Assuming it falls within the definition of a law  
18 enforcement activity.

19 MR. PAOLELLA: Justice Sotomayor, let me  
20 begin answering that question by making a distinction  
21 which I think is an important distinction here, between  
22 the definition of status and the definition of the  
23 conduct that's implied here. Because I think this is a  
24 crucial difference between the amicus's argument on one  
25 hand and the Solicitor General's office on the other

1 hand.

2 The amicus would limit the type of conduct  
3 that's covered by the statute. They would limit it to  
4 actions that occur in a law enforcement capacity. So  
5 I'm not sure exactly what that means. I think that gets  
6 passed along with ---

7 JUSTICE SOTOMAYOR: I think they're saying  
8 is arrests, search and seizure, and whatever the third  
9 was.

10 MR. PAOLELLA: Or some other similar  
11 activities, which, again, I'm not sure addresses the  
12 topic --

13 JUSTICE SOTOMAYOR: But let's define it more  
14 broadly. Let's assume I was willing to define it to  
15 include all of the activities that a law enforcement  
16 agent would engage in, including protective services,  
17 security services, like your officers.

18 MR. PAOLELLA: Yes, Your Honor.

19 JUSTICE SOTOMAYOR: Let's assume that we've  
20 defined it more broadly. What's the problem with their  
21 position?

22 MR. PAOLELLA: The problem with their  
23 position is -- with the amicus --

24 JUSTICE SOTOMAYOR: And of -- yes, with  
25 amicus's or the government's, meaning, instead of



1 limiting it to criminal activity, limited to law  
2 enforcement activities broadly defined.

3 MR. PAOLELLA: The problem with amicus's  
4 requirement is that it has no textual basis in the  
5 statute. The statute is very precise.

6 JUSTICE SCALIA: Well, I will give you --  
7 I'll give you a textual basis. Why is it if all the  
8 statute is concerned about is the status of being a law  
9 enforcement -- investigative or law enforcement  
10 officer -- why is it that the exception it makes does  
11 not eliminate the exemption for libel, slander,  
12 misrepresentation, deceit or interference with contract  
13 rights?

14 There is excepted from the provisions of the  
15 Tort Claims Act any claim arising out of assault,  
16 battery, false imprisonment, false arrest, malicious  
17 prosecution, abusive process, libel, slander,  
18 misrepresentation, deceit or interference with contract  
19 rights.

20 However, for -- for purposes of this  
21 exemption from the exemption -- the exception from the  
22 exemption, they leave out the latter part. Why did they  
23 only put in the others? I think the reason they only  
24 put in the others is that those are the kind of torts  
25 that would be conducted in the course of conducting a --

1     what's the words -- investigative or law enforcement  
2     activity.

3                     MR. PAOLELLA:   Well, Your Honor --

4                     JUSTICE SCALIA:   The others would not --  
5     would not occur.

6                     MR. PAOLELLA:   I think that that is a  
7     limiting factor that is not just implicit but explicit  
8     in the statutory text.

9                     JUSTICE SCALIA:   Yes, but it's -- it's a  
10    limiting factor that -- that shows, that displays an  
11    intent to limit the -- the activities of investigative  
12    or law enforcement officers to those activities  
13    conducted in the course of investigating or enforcing  
14    the law.

15                    MR. PAOLELLA:   Well, the fact that Congress  
16    was so explicit about categorizing precisely the kind of  
17    torts that are covered here -- that sort of conduct --  
18    and the fact that Congress was so precise about  
19    cross-referencing Section 1346(b), which incorporates of  
20    the scope of employment requirement, suggests to me that  
21    when Congress wanted to confine the capacity in which  
22    the acts occurred, it could do so, and it did in fact do  
23    so.

24                    JUSTICE GINSBURG:   I understand --

25                    JUSTICE SCALIA:   Why would it leave out

1     those other ones? That's what I'm asking you. What  
2     possible reason is there to leave out libel, slander,  
3     misrepresentation, deceit, or interference with contract  
4     rights?

5                   MR. PAOLELLA: That was the policy judgment  
6     that Congress made, that it would not --

7                   JUSTICE SCALIA: I -- I didn't deny that  
8     it's the judgment. What reason could there be for that  
9     judgment?

10                  MR. PAOLELLA: That it didn't think that  
11     those sorts of torts in this context -- and I think we  
12     all agree this is a law enforcement-oriented provision.  
13     It's called the law enforcement proviso.

14                  JUSTICE SCALIA: I give you a reason.

15                  MR. PAOLELLA: Yes.

16                  JUSTICE SCALIA: The reason -- the reason  
17     they left it out is that they don't think those torts  
18     would be committed in the course of investigating or  
19     enforcing the law.

20                  MR. PAOLELLA: I think that's right,  
21     Your Honor, but that doesn't mean that from that we  
22     ought to draw an entirely extra-textual additional  
23     limitation that goes beyond the specific line that  
24     Congress did, in fact, draw here.

25                  JUSTICE GINSBURG: Your view is that the

1 limitation is scope of employment.

2 MR. PAOLELLA: That's right.

3 JUSTICE GINSBURG: The scope of employment  
4 is, and you don't add on anything else to that. You  
5 don't add arrest, search and seizure.

6 But does this whole issue have an academic  
7 flavor, because how in the world could the conduct  
8 involved in this case qualify as within the scope of  
9 employment?

10 MR. PAOLELLA: First of all, Your Honor, I  
11 think that the question of scope of employment was  
12 something that was conceded below. It was never  
13 litigated. It was never briefed before the Respondents'  
14 brief. And from my reading of the question presented as  
15 this Court formulated it, it was excluded from the  
16 question presented. So I don't think this Court needs  
17 to address it. It's more properly addressed on remand  
18 if it's important.

19 But here I think that there is an argument  
20 that's within the scope of employment. And if you look  
21 at cases, for example the Mary M. case out of the  
22 California Supreme Court, there the California Supreme  
23 Court held that a sexual assault by a law enforcement  
24 officer of an individual who was subject to that  
25 officer's authority could be held to be within the scope

1 of employment, because an officer is vested with  
2 authority and it is reasonably foreseeable that that  
3 authority can sometimes be abused if it happens when the  
4 officer is in uniform, on job hours, dealing with  
5 someone who that individual is authorized to use  
6 appropriate force against.

7 And even in Pennsylvania, you see cases  
8 where people do outrageous things, like a private  
9 detective shooting a picketing protester, where the  
10 Pennsylvania courts have held that that's within the  
11 scope of employment.

12 It's a complicated issue. It's an issue of  
13 State law and it will be different in every State, which  
14 is why I would suggest it's more appropriate for this to  
15 be handled on remand rather than have a ruling by this  
16 Court on a narrow issue of Pennsylvania State law. But  
17 I think it is hardly implausible that Pennsylvania  
18 courts would find this within the scope of employment.

19 Your Honor, if there's no further questions,  
20 I will reserve the remainder of my time.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 Mr. Yang.

23 ORAL ARGUMENT OF ANTHONY A. YANG,

24 FOR RESPONDENT, SUPPORTING REVERSAL AND REMAND

25 MR. YANG: Mr. Chief Justice and may it

1 please the Court:

2           The text and structure of the law  
3 enforcement proviso in the Federal Tort Claims Act more  
4 generally make clear that the proviso unambiguously  
5 waives sovereign immunity for claims arising under the  
6 six intentional torts listed for acts or omissions of  
7 persons qualifying as Federal law enforcement officers  
8 while acting within their scope of employment.

9           Nothing in the statute supports amicus's  
10 additional limit, which would require such officers to  
11 be acting in a law enforcement capacity or by exercising  
12 law enforcement authority, neither of which phrase  
13 occurs within the statute itself. Quite the contrary --

14           JUSTICE KAGAN: What are the kinds of  
15 things, Mr. Yang, that would be within the scope of  
16 employment, but would not be acting within a law  
17 enforcement capacity for a law enforcement officer?  
18 What's the difference between those two standards for a  
19 law enforcement officer?

20           MR. YANG: Well, this is complicated by the  
21 fact that for the Federal Tort Claims Act, scope of  
22 employment is a question that turns on State law. As a  
23 result it will vary. Some States have a rather broad  
24 understanding of scope of employment and sometimes in  
25 fact will encompass within the scope of employment

1     rather egregious intentional torts.  It's not  
2     necessarily what the Court might think of as within the  
3     scope of one's Federal law enforcement authority.

4                     So with respect to law enforcement  
5     authority, I mean, this -- that makes the question a  
6     little more difficult because that is not something that  
7     actually appears in the statute and it's not something  
8     that the United States embraces as a test because it is  
9     a creation of the amicus.

10                    What the statute here does, the only term --  
11     the only place that it uses law enforcement is in the  
12     defined term "investigative or law enforcement officer"  
13     and then what it does in defining that term --

14                    JUSTICE KAGAN:  But you can't give me just a  
15     couple of examples of how the difference would matter,  
16     you know, in some States, where something would be --  
17     would meet the scope of employment test, but not meet  
18     the acting as a law enforcement officer test, for a law  
19     enforcement officer again.

20                    MR. YANG:  Again, acting as a law  
21     enforcement officer test is not something that appears  
22     in the statute and it's not something that even amicus  
23     has tried to meet the limitations of.  It could mean  
24     various things.  It could mean, for instance, something  
25     as limited as executing a search, seizing evidence or

1 making an arrest. That would be the Pooler type of  
2 rationale.

3           It could be something incident to that,  
4 writing a report, as amicus suggests. It could be other  
5 things. Law enforcement officers often aren't doing the  
6 very things that we're talking about. They go on  
7 patrol, they talk to kids in schools. There are all  
8 types of things that law enforcement officers might do  
9 that don't fall within what might thing -- what one  
10 might think of as what, you know, you see on television  
11 when officers are making contact with the public in  
12 rather high stakes incidents.

13           So it's difficult both because we have a  
14 State law term that varies and a term that doesn't even  
15 appear in the statute and that we don't embrace. So  
16 again, it's difficult to provide examples in any  
17 definitive way because both of the comparators shift  
18 depending on what we're talking about.

19           JUSTICE GINSBURG: Mr. Yang, even if --  
20 if -- it depends on State law, that's clear. But does  
21 the United States sometimes concede scope of authority  
22 so it can represent -- it can be the sole defendant in  
23 the case, the individual officer is off the hook, so  
24 that the United States could make the argument: It  
25 never happened; the officer didn't do what the plaintiff



1 charged?

2 MR. YANG: I believe, if I understand your  
3 question correctly, the answer is yes, but let me  
4 qualify that. This came up in a case called  
5 Osborne v. Haley. And the question about scope of  
6 employment for purposes of the Westfall Act turns on  
7 whether at the time of the alleged incident the officer,  
8 or employee in many cases, was acting within the scope  
9 of his or her employment.

10 Now, when the United States investigates,  
11 this is authority that is delegated to the Attorney  
12 General, which is in turn redelegated to the U.S.  
13 Attorney's offices, investigates the relevant  
14 circumstances and determines that the allegations are  
15 just false, not correct at all, in fact it never  
16 happened, the employee was sitting at his or her desk  
17 beavering away at important Federal matters, in that  
18 instance, the Government will say that the employee was  
19 in fact acting within the scope of his or her employment  
20 and can explain that the reason for that is the  
21 Government rejects the underlying factual assertion.

22 That's something that then is litigated if  
23 the Plaintiff seeks to challenge the scope  
24 determination. And the Court's decision in Osborne  
25 explains that this is how the situation will play out,

1 is that then the merits of the case ultimately condense  
2 into a challenge to the scope certification of the  
3 Attorney General.

4 So, no, we don't simply say they were within  
5 scope for no reason. We determine whether they were  
6 within scope by evaluating the circumstances at issue  
7 and if the alleged circumstances did not occur and the  
8 employee was acting within the scope properly, we will  
9 certify that the employee was acting within the scope.

10 JUSTICE SOTOMAYOR: Could you go back and  
11 tell me, yet again -- you give a limiting principle, but  
12 I'm not sure how it applies. You seem to be saying --  
13 do you agree with your -- with the Petitioner that law  
14 enforcement officer includes correction officers?

15 MR. YANG: It does.

16 JUSTICE SOTOMAYOR: And why? Because they  
17 have all of those other powers, so how is that different  
18 from those in the civil area who have similar powers to  
19 arrest, search and seize, to --

20 MR. YANG: Well, I guess there are two  
21 elements to the definition of investigative or law  
22 enforcement officer within the statute. First, they  
23 have to be an officer of the United States. And the  
24 term "officer" when we are talking about Federal  
25 officers, the dictionary definition that most commonly

1 and comfortably applies here, are ones that we're  
2 talking about like sheriffs, constables, bailiffs,  
3 people who have normal Federal criminal law enforcement  
4 -- well, not Federal but criminal law enforcement  
5 responsibilities.

6 That -- you know, when you back out to the  
7 second criteria, we think that reinforces --

8 JUSTICE SOTOMAYOR: How about Customs  
9 agents?

10 MR. YANG: Customs agents? I don't know if  
11 they have criminal -- I believe if we assume that they  
12 are simply doing a civil function, Custom agents would  
13 not fall within the term "officer" as normally applied.

14 Let me give you an example that the amicus  
15 raises, Federal forest employees -- Forest Service  
16 employees. Forest Service employees, the clerks that  
17 work in D.C. are not what one would normally think of as  
18 an officer, particularly when we are talking about the  
19 phrase "law enforcement officer."

20 JUSTICE SOTOMAYOR: My problem is park  
21 employees I think of as officers when you meet them at  
22 the parks. They are guarding the parks.

23 MR. YANG: Some, some --

24 JUSTICE SOTOMAYOR: Or they may also be  
25 giving tours. They are usually doing sort of a mixture

1 of --

2 MR. YANG: Actually, I don't think that  
3 is --

4 JUSTICE SOTOMAYOR: -- duties.

5 MR. YANG: -- that's correct, Your Honor.  
6 The Forest Service, as other park -- the Park Service,  
7 has different roles for various individuals within their  
8 employ. And there are, in fact, law enforcement  
9 officers in the Park Service, and there are law  
10 enforcement officers in the Forest Service, and their  
11 duties are what one would traditionally think of as law  
12 enforcement.

13 JUSTICE SCALIA: Mr. Yang, the United States  
14 didn't take this position below, right?

15 MR. YANG: That is correct.

16 JUSTICE SCALIA: This is a change of heart.  
17 How long ago was it that the United States took the  
18 opposite position, the position argued by amicus here?

19 MR. YANG: Well, this is the Orsay position,  
20 which is not the Pooler position I believe the Court is  
21 talking about. Pooler, the Government has not taken the  
22 view that the Third Circuit was correct and Pooler, as  
23 far as I can tell, except within the Third Circuit, is  
24 binding precedent.

25 Now, when we take a step back and abandon

1 Pooler's limited approach and apply a more amorphous law  
2 enforcement capacity, law enforcement authority, the  
3 Government has done that in a number of lower cases,  
4 including several courts of appeals --

5 JUSTICE SCALIA: So it couldn't be that  
6 obvious, I guess?

7 MR. YANG: Well, I think in those cases the  
8 Government took a position that never was a position  
9 that made it to the Solicitor General's office. And  
10 when we took this -- both in the Reynolds case when  
11 there was an adverse decision to the United States and  
12 in this case, we determined that the position was not  
13 one that could be -- was not correct under the text.

14 And I think, as amicus's -- amicus does, I  
15 think, a valiant job of trying to defend that position,  
16 but at the end of the day, there simply is not a textual  
17 argument to get to that outcome.

18 JUSTICE KENNEDY: I think it is true that  
19 there is a strong textual argument for your position.  
20 But let me ask this: Are there any studies or any  
21 statistics we can look at to see as a predictive matter  
22 how many prison suits against the government this ruling  
23 that you propose would -- would cause? It seems to me  
24 we have close to 200,000 Federal prisoners, I think, and  
25 this prison work, there is a lot of shoving, guards have

1 to break up fights.

2                   So there is going to be any number of  
3 instances where the question is did the guard overreach.  
4 And if I make the assumption, and it's just an  
5 assumption because I haven't looked at any statistics,  
6 but there is -- this is going to vastly expand the  
7 number of cases in which the Government is the  
8 defendant. Doesn't that bear on the likelihood of the  
9 congressional intent to adopt your position?

10                  MR. YANG: I guess there is a few parts to  
11 that question. On the statistics, I am not aware of any  
12 statistics that we would be able to reliably extrapolate  
13 to see what this would mean. I think there may well be  
14 some additional cases. However, there are other tools,  
15 as we explain in our reply brief, including the Prison  
16 Litigation Reform Act, which requires the prisoners both  
17 pay their filing fees and if they obtain three strikes,  
18 must in fact -- they lose IFP status and must pay that  
19 filing fee in advance, and it's a substantial amount of  
20 money for many prisoners, given what they earn.

21                  So we think that it's not a reason to ignore  
22 what we think is the plain text, particularly where  
23 Congress here has in the proviso specifically referenced  
24 Section 1346(b). Section 1346(b) makes clear that the  
25 waiver of sovereign immunity applies to acts or

1 omissions committed within the scope of employment.

2 JUSTICE SCALIA: Can you suggest why  
3 Congress might have left out libel, slander,  
4 misrepresentation?

5 MR. YANG: Yes. I think --

6 JUSTICE SCALIA: Why -- why would they leave  
7 that out if they are only looking at the office and not  
8 at the function that the person is performing?

9 MR. YANG: Well, I think that those torts  
10 serve as a rough approximation of what Congress  
11 anticipated would be the areas where it thought the  
12 United States should be liable, when we are talking  
13 about Federal law enforcement officers. And I think in  
14 fact --

15 JUSTICE SCALIA: Right. I mean, that's the  
16 point. So what you are saying is that it suggests that  
17 they mean Federal law enforcement officers engaged in  
18 law enforcement.

19 MR. YANG: Well, not -- I don't know that  
20 that is the case, Justice Scalia. Certainly there is  
21 some correlation between those torts and how we should,  
22 for instance, understand "officer of the United States,"  
23 things like false imprisonment, false arrest, malicious  
24 prosecution. All evoke Federal criminal law employment  
25 ideas. However, when we look at the text that Congress

1 used to implement the statute, the text is not like any  
2 of the other instances within the Federal Tort Claims  
3 Act, where Congress has limited the waiver to particular  
4 types of activities or carved out certain activities.

5 In fact, what Congress did was reference  
6 back to the general waiver provision which explains that  
7 the waiver applies to acts within the scope of  
8 employment.

9 If Congress had wanted, for instance, to say  
10 only within law enforcement capacity, it would have used  
11 very different language. The language of sections --  
12 the other provisions in Sections 2680, for instance,  
13 subsections (a), (b), and (c), which limit -- which  
14 carve out the execution of a statute or regulation,  
15 exercise of discretionary functions, the laws of  
16 miscarriage or negligent transmission of postal matter,  
17 assessment or collection of taxes or customs duties, (f)  
18 specifically directs -- carves out the imposition or  
19 establishment of a quarantine, (j) carves out the  
20 combatant activities of military forces. If Congress  
21 wanted to use similar language like law enforcement  
22 activities of a law enforcement officer, it would have  
23 done that.

24 And the United States -- I don't want to  
25 bang the drums too loudly here. We did take a contrary



1 position previously, but when our office reviewed the  
2 case, we simply determined that the position could not  
3 be one that would square to the test.

4 JUSTICE SOTOMAYOR: Let's assume we adopted  
5 the definition Justice Scalia just proposed, law  
6 enforcement officer engaged in law enforcement  
7 activities. Would correction officers be engaged in law  
8 enforcement activities?

9 MR. YANG: Well, yes -- maybe yes, maybe no.  
10 What we are talking about is an undefined term and the  
11 term does not even -- does not appear in the statute.

12 JUSTICE SOTOMAYOR: Well, you can look at it  
13 both ways. Are correction officers as officers who are  
14 protecting or securing prisoners, are they acting in a  
15 law enforcement capacity in your -- forget about what  
16 act, what tort they commit, but do they function --

17 MR. YANG: There could be many answers to  
18 that question.

19 JUSTICE SOTOMAYOR: Okay.

20 MR. YANG: You could, as the amicus or as  
21 the Petitioner suggests, say that the enforcement of a  
22 criminal sentence is part of law enforcement capacity,  
23 so anything that they do is law enforcement.

24 You could think of law enforcement capacity  
25 as more like arrests, you know, searches for violations

1 of Federal criminal law, and that sort of thing. Those  
2 might be exercises that the Court would have to engage  
3 in if Congress had actually used text directing the  
4 Court to look at that.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.

6 MR. YANG: Thank you.

7 CHIEF JUSTICE ROBERTS: Mr. Bucholtz.

8 ORAL ARGUMENT OF JEFFREY S. BUCHOLTZ,  
9 FOR AMICUS CURIAE, IN SUPPORT OF THE JUDGMENT BELOW,  
10 APPOINTED BY THIS COURT

11 MR. BUCHOLTZ: Mr. Chief Justice and may it  
12 please the Court:

13 I hope to convince the Court of two things  
14 today. First is about our reading of the law  
15 enforcement proviso as limited to conduct of  
16 investigative or law enforcement officers acting as  
17 such. The first is that that reading is textually  
18 plausible. It is a reasonable reading of what Congress  
19 enacted in light of the structure of the statute and in  
20 light of ordinary English usage.

21 JUSTICE GINSBURG: May I ask, in light of  
22 your opening statement, are you then abandoning your  
23 position that it must be either arrest, search or  
24 seizure? You have used the Ninth Circuit formula.

25 MR. BUCHOLTZ: Well, Justice Ginsburg, it's

1 not really clear how different the Ninth Circuit and the  
2 Third Circuit are from each other, because there haven't  
3 been cases that have arisen that have really tested the  
4 proposition that the Third Circuit meant only, literally  
5 only, the execution of a search, the seizure of  
6 evidence, or the making of an arrest, and that would  
7 exclude conduct very closely incident to one of those  
8 things. Those cases just haven't arisen.

9               So the courts have used different  
10 formulations. They appear to mean slightly different  
11 things by them, but I wouldn't want to exaggerate the  
12 differences between the Third Circuit and the Ninth  
13 Circuit. Both are trying to capture what Congress was  
14 getting at here, which was the law enforcement proviso  
15 was about law enforcement activity. It was about  
16 covering the United States under the FTCA for abuses of  
17 law enforcement authority like had occurred in  
18 Collinsville, which was the national scandal that  
19 prompted the enactment of the proviso.

20               So I think the answer to, Justice Ginsburg,  
21 to your question, is: We think that if you take the  
22 Third Circuit's language in Pooler, which of course is  
23 not this case, but if you take the Pooler language  
24 literally and you say that the only conduct covered is  
25 conduct in the course of -- that's language the Court

1 used a few times in Pooler -- in the course of a search,  
2 an arrest, or a seizure of evidence, that's problematic  
3 because it's clear that Congress was trying to cover  
4 abuses of law enforcement authority, including malicious  
5 prosecution and abuse of process, which we know because  
6 Congress included those torts in the exception to the  
7 exception. And if you had a situation where an officer  
8 conducted a search and then wrote a false report about  
9 the search that he had conducted, the writing of the  
10 report wouldn't literally be in the course of the  
11 search. So if you take those words in Pooler literally,  
12 that would be excluded. That can't be right.

13 So to that extent we agree with the Ninth  
14 Circuit position rather than the Third Circuit position.  
15 But again I'm not really sure that it's fair to  
16 attribute that extreme position to the Third Circuit.

17 JUSTICE KAGAN: Mr. Bucholtz, the statute  
18 itself has a kind of conduct-based limitation in it. It  
19 says law enforcement officers acting within the scope of  
20 their employment.

21 So I guess my question is, given that there  
22 is that conduct-based limitation in the statute, why one  
23 would substitute for it law enforcement officers acting  
24 as law enforcement officers? Why wouldn't one use just  
25 the conduct-based limitation that's already there?

1                   MR. BUCHOLTZ: Justice Kagan, I don't think  
2   it's a substitution. I think it's an addition if it's  
3   anything. But really the reason is that under ordinary  
4   English usage, when there's a reference to somebody  
5   defined by their status, it's fair to assume that the  
6   reference to the person defined by their status is  
7   really just intended to cover things they do in that  
8   relevant status and not things they do in some other  
9   capacity.

10                  What we're asking the Court to do here is  
11   exactly what the Court did in Lane v. Pena. In Lane v.  
12   Pena, the statute at issue was the Rehabilitation Act.  
13   It waived sovereign immunity and provided a damages  
14   remedy against Federal providers of funding. The  
15   Department of Transportation clearly was a Federal  
16   provider of funding. It gave out all sorts of funding  
17   to all sorts of recipients.

18                  But that's not what the case was about. The  
19   case was about the Merchant Marine Academy and somebody  
20   who was dismissed from it. And what the Court said is  
21   the reference to Federal funding providers like the  
22   Department of Transportation had to be read as limited  
23   to Federal funding providers acting as such. Those were  
24   the Court's words, "acting as such."

25                  JUSTICE KENNEDY: Okay. And then -- then

1 take that theory and track through the statute to show  
2 me how that theory works, which is what your opening  
3 argument was going to do?

4 MR. BUCHOLTZ: Justice Kennedy, in the first  
5 sentence of the proviso, the operative provision,  
6 Congress referred to acts or omissions of investigative  
7 or law enforcement officers of the United States.  
8 Congress didn't say any acts or omissions of  
9 investigative or law enforcement officers were covered.  
10 It didn't say all were covered. It just said acts or  
11 omissions of law enforcement officers in the same way  
12 that the statute at issue in Lane referred to conduct of  
13 a Federal funding provider.

14 And so what this Court should do, we submit,  
15 is construe acts or omissions of investigative or law  
16 enforcement officers of the United States as limited to  
17 acts or omissions of those defined -- that defined class  
18 of persons in the relevant capacity, when they're acting  
19 as law enforcement officers.

20 JUSTICE KAGAN: But again, it's not just any  
21 acts of law enforcement officers. It's acts of law  
22 enforcement officers acting within the scope of their  
23 authority. And now you're saying acting as a law  
24 enforcement officer. I mean, one question I suppose I  
25 have, which is the same question that I gave to Mr.

1 Yang, is what's the difference between those two things?  
2 And I guess the second question is: Why would we  
3 substitute one phrase about how they have to be acting  
4 for the phrase that Congress actually used?

5 MR. BUCHOLTZ: Congress didn't, in the  
6 proviso, Justice Kagan, Congress did not actually use  
7 the phrase "scope of employment." It did not actually  
8 incorporate scope of employment as a limitation  
9 explicitly in the proviso. It -- it incorporated  
10 1346(b), which contains the scope requirement. But the  
11 proviso -- in the proviso, Congress did not actually  
12 speak in terms of scope of employment as the operative  
13 limitation. So I don't think we'd be substituting the  
14 acting as such limitation for anything that actually  
15 appears in the proviso.

16 JUSTICE GINSBURG: Is it a limitation? Is  
17 scope a limitation? I thought that you -- you didn't  
18 question that, that scope is a limitation on the conduct  
19 that's covered, right?

20 MR. BUCHOLTZ: Justice Ginsburg, we  
21 certainly agree that -- that the conduct that's covered  
22 has to be within the scope of the Federal officer's  
23 employment. The only point I was trying to make a  
24 moment ago in response to Justice Kagan is that  
25 requirement exists in 1346, not in the proviso by its

1 terms. We certainly agree with that, and as we've  
2 argued in our brief, we think that one way the Court  
3 could affirm the judgment below is to hold that the  
4 officers here were not acting within the scope of their  
5 employment, taking the allegations as true, as they have  
6 to be at this stage of the case.

7 But to return to Justice Kagan, to your  
8 question about why Congress would have wanted to -- the  
9 Court to -- to interpret "acts or omissions of law  
10 enforcement officers" as acting as such, it's because --  
11 in part the answer is because scope turns on State law.  
12 So Congress doesn't know when it enacts the proviso  
13 what's going to be covered if the only limitation is  
14 scope, because that turns on 50 different States' laws.  
15 And -- and I think that it's fair to say that there are  
16 actual meaningful differences between different States'  
17 laws as to scope as we -- as we point out in our brief.

18 But the other part of the answer is the --  
19 is the second part of this Court's analysis in *Lane v.*  
20 *Pena*, which is it's entirely possible literally to read  
21 the Rehabilitation Act in *Lane*, and I would grant that  
22 it's possible literally to read the words in the  
23 proviso, as covering everything that a defined law  
24 enforcement officer does within the scope of employment.  
25 But the Court said in *Lane*: We can't read the statute



1 that way, because we're talking about a waiver of  
2 immunity, and waivers of immunity, even if you don't  
3 have to put a heavy thumb on the scales and even if you  
4 don't have to require that it be unequivocal -- we're  
5 not going that far here -- you can't interpret it more  
6 broadly than there's any reason to think Congress meant.

7 JUSTICE BREYER: What does it leave out?  
8 What does it leave out, your theory? A policeman's a  
9 law enforcement officer. What does he do on his job  
10 that isn't in a law enforcement role?

11 MR. BUCHOLTZ: Well, there may be certain  
12 types of law enforcement officers, Justice Breyer, who  
13 generally aren't engaged in law enforcement activity  
14 when they're within the scope of employment. But that's  
15 not the case with respect to correctional officers like  
16 are at issue here.

17 JUSTICE BREYER: Oh, I see.

18 MR. BUCHOLTZ: And the reason for that is --  
19 and other types of officers, which hopefully I'll be  
20 able to get to, but correctional officers first since  
21 that's what this case is about. 18 U.S.C. 3050 is what  
22 makes correctional officers fall within the second  
23 sentence of the proviso, the definition that Congress  
24 provided of investigative or law enforcement officers.  
25 It's what gives them the authority to execute --

1 JUSTICE BREYER: So your idea here is a park  
2 policeman who is engaged in law enforcement some of the  
3 time, but engaged in giving tours the rest of the time.  
4 You're saying what you would do is say when he's engaged  
5 in the law enforcement he's covered, but not when he's  
6 engaged in the tour.

7 MR. BUCHOLTZ: That's right, because he  
8 meets the status-based definition that Congress  
9 provided, but there's no reason to think Congress  
10 intended that he be covered when he's not engaged in law  
11 enforcement activity.

12 JUSTICE SOTOMAYOR: I'm sorry. What -- what  
13 is it about a corrections officer other than the act  
14 that was committed here, which was an alleged sexual act  
15 which nobody could, except by some definition of State  
16 law, think that that ever happens naturally in the  
17 course. But that's an intentional assault. The very  
18 definition of the crimes that are covered assumes that  
19 it's not an act that's licensed. So, why isn't the  
20 correction officer acting in a law enforcement capacity  
21 when he's restraining people and securing them?

22 MR. BUCHOLTZ: Because the correctional  
23 officer essentially has two capacities. 18 U.S.C.  
24 3050, which is the only source of law that anyone has  
25 pointed to, to make correctional officers fall within

1 the definition of law enforcement officers in the first  
2 place, it has nothing to do with correctional officers'  
3 daily interaction with already incarcerated prisoners.  
4 It authorizes correctional officers to arrest escaped  
5 inmates and to arrest visitors to prisons. It has no  
6 application to their daily interaction with  
7 prisoners who are already incarcerated.

8 JUSTICE GINSBURG: What about the takedown  
9 that occurred here and I -- it's not uncommon. The --  
10 your definition includes three things, arrest, search,  
11 seizure. And correctional officers do engage in  
12 searches of cells for contraband, and they do engage in  
13 seizures. Those are not -- this isn't like arrest,  
14 which you point out the arrest is unusual; it's an  
15 escapee or a visitor. But that's not true of search and  
16 seizure.

17 MR. BUCHOLTZ: Justice Ginsburg,  
18 correctional officers do search prisoners' cells on a  
19 routine basis as part of their duty to maintain order  
20 and security within the prisons. That responsibility  
21 comes not from 18 U.S.C. 3050, but from 18 U.S.C. 4001  
22 and following, which is an entirely different set of  
23 legal authorities that has to do with the Attorney  
24 General's management of the Bureau of Prisons under his  
25 supervision and correctional officers -- and 28 C.F.R.

1 Part 552, which is where the correctional officers get  
2 their authority from to search prisoner cells, et  
3 cetera.

4 We think that when -- when correctional  
5 officers are engaged in that kind of activity, they're  
6 acting in a security capacity to maintain order and  
7 security within the prison. They're not acting in their  
8 very narrow law enforcement capacity conferred by 18  
9 U.S.C. 3050. This case doesn't have --

10 JUSTICE SOTOMAYOR: Well, what happens --  
11 what happens in the police precinct when police officers  
12 are holding pretrial detainees? Are they acting as  
13 police officers or as security people? Or even when a  
14 prisoner comes back to court for a court appearance and  
15 there are U.S. marshals who guard them rather than  
16 correction officers, what are they serving as in your  
17 mind?

18 MR. BUCHOLTZ: Well, as I said before,  
19 Justice Sotomayor, I think there are certain types of  
20 law enforcement officers who generally when they're  
21 acting within the scope of employment are engaged in law  
22 enforcement activity. And deputy U.S. marshals would  
23 probably fall within that. But the important point  
24 about this case is it doesn't, Justice Ginsburg, involve  
25 an allegation about a search. So whatever the Court

1 might think the right way to look at correctional  
2 officers when they're engaged in searches might be, this  
3 case isn't about a search.

4 JUSTICE BREYER: Well, why isn't this -- why  
5 isn't what the prison guard does law enforcement? I  
6 mean, the law says these people are going to be locked  
7 up and he's enforcing that.

8 MR. BUCHOLTZ: The law is already --

9 JUSTICE BREYER: He's going to be in prison  
10 under these da, da, da, da, da. You know, all that da,  
11 da, da means the conditions of the prison, et cetera,  
12 they're all regulations, rules, statutes. He's  
13 enforcing them, why not?

14 MR. BUCHOLTZ: Justice Breyer, I think we  
15 can tell from the definition in the proviso what  
16 Congress was focused on when it -- when it referred to  
17 law enforcement officers. We can tell what Congress --

18 JUSTICE BREYER: Well, so now you're saying  
19 what those three things could provide the definition?

20 MR. BUCHOLTZ: And -- and -- and other  
21 conduct that --

22 JUSTICE BREYER: And are you saying that?

23 MR. BUCHOLTZ: -- I used before is yes, with  
24 the caveat, and I think it's an important one, that it's  
25 not just those three things, only what occurs in the

1 course of those three things the way Pooler could  
2 possibly be read, but also conduct that's closely  
3 incident to those things.

4 JUSTICE SCALIA: Well, you don't think the  
5 EPA is engaged in law enforcement when it enforces  
6 statutes and regulations, do you?

7 MR. BUCHOLTZ: It depends, Justice Scalia,  
8 it depends --

9 JUSTICE SCALIA: Would an officer of the EPA  
10 be a law enforcement officer when he writes a letter to  
11 a company saying, You know, you are violating section  
12 such-and-such of the statute? Is that a law enforcement  
13 officer?

14 MR. BUCHOLTZ: Well, the person who writes  
15 the letter may qualify as a law enforcement officer  
16 under the definition, but that's a different question, I  
17 would submit, than whether that -- whether that act  
18 constitutes law enforcement activity.

19 I think the answer to that question,  
20 Justice Scalia, is probably no, but the important  
21 follow-up is if that person meets the definition of law  
22 enforcement officer because he's an EPA agent, and after  
23 the letter he follows up and goes to the premises of the  
24 recipient of the letter, knocks down the door and  
25 conducts an illegal search, that's what Congress was

1     trying to cover.

2                   JUSTICE BREYER:  Yeah, but EPA is not what  
3     I'm thinking of, I don't think they are.  I am thinking  
4     of police.  Okay.  Now, one basic job of a policeman is  
5     to patrol, but not arresting people, not searching and  
6     not seizing evidence.  They are on patrol.  That's  
7     basically what they do.  All right?  Is that a law  
8     enforcement activity?

9                   MR. BUCHOLTZ:  If it's an FBI agent?

10                  JUSTICE BREYER:  Yeah, yeah, yeah, but I  
11     mean in places -- it's Federal, I understand.  So I'm  
12     sure we can find analogies in the Federal situation to  
13     ordinary policemen.

14                  MR. BUCHOLTZ:  Justice Breyer, the answer --  
15     the answer -- well, it might not be so easy to find an  
16     analogy to an ordinary policeman --

17                  JUSTICE BREYER:  All right.  But FBI agents,  
18     who are the federal police, they're people on Federal  
19     enclaves, for example, there are -- they are on Federal  
20     enclaves, they act like policemen, okay.

21                  MR. BUCHOLTZ:  Sure.  And when they are  
22     engaged in patrols, I think it's fair to say that's  
23     probably law enforcement activity --

24                  JUSTICE BREYER:  Okay.  That's fair.  I  
25     mean, what I'm thinking of is either you can have a

1 broad definition or one that's going to get into trouble  
2 when we consider real policemen. So if you have a broad  
3 one, then I don't see how prison guards get out of it.  
4 If you have a narrow one, my guess is we could find lots  
5 of Federal policemen who really are policemen who aren't  
6 doing what falls -- who are doing what falls outside  
7 your narrow definition. I wish I could think of better  
8 examples, but I came up with the ones I did.

9 MR. BUCHOLTZ: Then maybe I should try to  
10 return to some of the examples that other Justices have  
11 given. So there was talk earlier about an OSHA  
12 inspector. The Government's position -- and I think  
13 this is an important difference between our position and  
14 the Government's -- the Government would say that  
15 because OSHA isn't a criminal law in the traditional  
16 sense and an OSHA inspector or an OSHA agent isn't  
17 enforcing criminal law in the colloquial sense, that  
18 that shouldn't be covered.

19 But if the OSHA inspector knocks down your  
20 door and conducts an illegal search and batters you, why  
21 shouldn't that be covered? We know that's a law  
22 enforcement abuse, and we know that law enforcement  
23 abuse is exactly what Congress is trying to get at. The  
24 Government, it's like it's trying to relitigate Marshall  
25 against Barlows where this Court held that OSHA



1 inspectors have to have a warrant even though you could  
2 think of OSHA as being administrative or civil as  
3 opposed to criminal. That's the argument that the  
4 Government made there a generation ago and they lost.

5 JUSTICE KENNEDY: So how does that argument  
6 help your case?

7 MR. BUCHOLTZ: Because, Justice Kennedy, the  
8 point in this case is that we agree that correctional  
9 officers fall within the plain language of the  
10 definition that Congress provided. Again, the structure  
11 of the proviso is there are two sentences, an operative  
12 provision and the definition.

13 We are trying to get the Court to construe  
14 the operative provision, the first sentence, in the same  
15 way the Court did in Lane against Pena. The Government  
16 is trying to get the Court to construe the definition,  
17 the second sentence. What Congress said in the  
18 definition, what the term means, the Court has much less  
19 scope to construe that in some way other than the  
20 literal language that Congress provided where Congress  
21 said what the term means.

22 So we agree under the plain language of the  
23 definition that correctional officers are investigative  
24 or law enforcement officers because of 18 U.S.C. 3050,  
25 which gives them the power under limited, and

1 inapplicable here, circumstances to arrest.

2 We think that if you look at correctional  
3 officers under 18 U.S.C. 3050 or under the different  
4 authorities under 18 U.S.C. 4001 and following and the  
5 regulations, that they wear two hats. Sometimes they  
6 act in a law enforcement capacity, but not usually,  
7 because that only applies in the narrow context of  
8 escapes or visitors. When they are dealing with already  
9 incarcerated prisoners, like in the allegations here,  
10 they are really not acting in that capacity at all.  
11 They are wearing a different hat.

12 JUSTICE SCALIA: You are saying that the  
13 Government is trying to minimize the consequences of  
14 coming out its way by providing a definition of the  
15 officers covered, which will not hold. You think it  
16 does cover a broader category of officers including OSHA  
17 inspectors, but it does not cover them when they are not  
18 engaged in law enforcement activities.

19 MR. BUCHOLTZ: Justice Scalia, you have  
20 absolutely perfectly encapsulated our position. Thank  
21 you.

22 (Laughter.)

23 MR. BUCHOLTZ: The reason why we think that  
24 that difference between our position and the  
25 Government's is important is that the Government's

1 position would render the proviso severely  
2 underinclusive. We know Congress was trying to get at  
3 law enforcement abuses and provide a remedy. And  
4 Congress -- the Government would say that if it's not a  
5 traditional law enforcement officer in the colloquial  
6 sense of like a constable, that it's not covered. But  
7 all sorts of agents of the United States from OSHA to  
8 FDA to all sorts of other agencies, to EPA, engage in  
9 law enforcement activity like the three things we know  
10 Congress was focused like a laser beam on: Executing  
11 searches, seizing evidence, making arrests for  
12 violations of Federal law. And I don't see any basis  
13 consistent with the text or our understanding of what  
14 Congress intended, to the extent it's different from the  
15 text, to say that that's not covered.

16 JUSTICE SOTOMAYOR: One other advantage of  
17 your definition is that it takes us out of workplace  
18 fights between two employees, because presumably the  
19 officers who punch each other out, if that incident  
20 occurs, aren't acting in a law enforcement capacity. I  
21 am assuming that is part of your argument as well.

22 MR. BUCHOLTZ: That's part of it, that's  
23 right.

24 JUSTICE SOTOMAYOR: All right. Then it goes  
25 back to the question I asked one of your adversaries,

1    which is all of this depends on how broadly or narrowly  
2    we define law enforcement activities.

3                   If we take it as broadly as the Government  
4    is suggesting, at moments, it would -- we could very  
5    well say, you are right, it's a law enforcement  
6    activity, but not as narrowly as some would have it be.  
7    It would include securing or detaining people, or  
8    securing or detaining people. And it would include the  
9    Park Service person who stops a visitor and punches them  
10   out. It would include the military personnel who stops  
11   someone and does an intentional tort against them, even  
12   though they may just be walking on the grounds rather  
13   than serving as security that particular day.

14                  So the point is, why should we give it the  
15   narrow reading you are giving, and not the broader  
16   reading the Government seems to be suggesting?

17                 MR. BUCHOLTZ: Well, two parts to the  
18   answer, Justice Sotomayor. The first is the Government  
19   is trying to give the first sentence the broader  
20   reading, which it recognizes then creates a problem that  
21   it tries to solve by narrowing the second sentence in a  
22   way that we think won't hold.

23                  But the other part of the answer,  
24   Justice Sotomayor, is it's about congressional intent.  
25   Justice Kennedy asked earlier about whether the

1 Government's interpretation or the Petitioner's  
2 interpretation would unleash a flood of suits by  
3 prisoners and whether it's fair to think that Congress  
4 would have intended that. If you look at the  
5 legislative history of the proviso, there is absolutely  
6 no indication that anyone in Congress contemplated that  
7 the proviso would or could or should apply in the prison  
8 situation. All Congress was focused on was providing a  
9 remedy for the kinds of raids that had occurred in  
10 Collinsville.

11 And so I think when somebody has two hats,  
12 like a prison guard has, because, again, there is two  
13 different sources of legal authority that they are  
14 exercising, 18 U.S.C. 3050 versus 4001, or a military  
15 policeman who has two hats, in the cases of Holian that  
16 we describe in our briefs where the Government made the  
17 argument that where a military policeman is engaged in a  
18 military function, not a law enforcement function, that  
19 they are not covered.

20 We think where somebody who meets the  
21 definition that Congress provided of an investigative or  
22 law enforcement officer has two distinct hats, two  
23 distinct capacities. When they are not acting in the  
24 law enforcement one, they are not covered. There is no  
25 reason to think that Congress intended that military

1 police or prison guards be covered when they are  
2 maintaining order on a military base or within a prison.  
3 That's not what Congress was trying to get at.

4           And we think again a severe disadvantage of  
5 the Government's position, they are trying to solve --  
6 in a sense they are trying to solve the same problem  
7 that we are with our acting as such interpretation, but  
8 they are trying to solve it through the wrong part of  
9 the statute and in a way that -- in a way ends up with  
10 the worst of both worlds.

11           You end up with broader coverage of the kind  
12 of conduct that's covered, broader than there is any  
13 reason to think Congress intended, conduct that doesn't  
14 involve law enforcement activity at all, but a narrower  
15 class of people whose conduct is covered. Where that  
16 excludes people like OSHA inspectors, FDA agents, EPA  
17 agents and in the rare circumstance where the Forest  
18 Service employee is acting as a law enforcement officer  
19 rather than as a botanist or an entomologist or  
20 something like that, we think Congress intended to cover  
21 them.

22           We know from the definition that there were  
23 three exercises of law enforcement authority that  
24 Congress was focused like a laser beam on: Executing  
25 searches, seizing evidence and making arrests. Where

1 somebody meets the definition of law enforcement officer  
2 and they are doing one of those three things, there is  
3 no basis not to say that they are covered.

4 We think it's better to interpret the first  
5 sentence of the proviso the same way the Court did in  
6 Lane against Pena as limited to acts or omissions of  
7 investigative or law enforcement officers acting as  
8 such, and keep the definition that Congress provided the  
9 way Congress provided it.

10 JUSTICE GINSBURG: Then scope becomes kind  
11 of a surplusage.

12 MR. BUCHOLTZ: Not surpluses necessarily,  
13 Justice Ginsburg, because it varies among States. There  
14 could be States where scope is narrower or broader, and  
15 there could always be situations where State law is such  
16 that the easiest way to resolve a case is under scope,  
17 and not under the concept of acting as a law enforcement  
18 officer.

19 JUSTICE GINSBURG: It has to be a law  
20 enforcement function. Give -- give me an example of a  
21 case where -- where scope would also be relevant, would  
22 also be applicable -- if you -- if there is a law  
23 enforcement function, then it fits. So what does scope  
24 add?

25 MR. BUCHOLTZ: Well, if an officer is

1     executing a search but he's doing so because of a  
2     personal vendetta against the person whose premises he's  
3     searching, and he's -- and he's not -- under whatever  
4     the State -- State's law that is applicable, if there is  
5     a relatively narrow conception of scope so that you have  
6     to be trying to serve your employer, which is the  
7     traditional rule, and not just sort of on the job in a  
8     loose sense, which is what the D.C. rule has come to be,  
9     an officer who is engaged in a search or making --  
10    making an arrest for a completely inappropriate reason,  
11    not trying to serve the employer, not in any way that's  
12    authorized by the employer, might not be within the  
13    scope, but might be engaged in one of the three law  
14    enforcement activities that Congress specified. And the  
15    other --

16                 JUSTICE KENNEDY: A prisoner -- a prisoner  
17    is supposed to be back in his cell block at 6:00 in the  
18    evening, he isn't, he's on the recreation yard, he's  
19    somewhat recalcitrant, and two guards carry him back to  
20    the cell block. Is that an arrest?

21                 MR. BUCHOLTZ: No, Justice Kennedy, it's not  
22    an arrest, for, among other reasons, the reason that  
23    prison guards don't have any legal authority to make an  
24    arrest in that circumstance.

25                 The prisoner's already been arrested.



1 That's how he got to jail in the first place.

2 JUSTICE KENNEDY: Well, he's violating the  
3 prison regulations.

4 MR. BUCHOLTZ: Yes. And 28 CFR part 552  
5 sets out the authorities that prison guards have to  
6 enforce prison regulations to maintain security and  
7 order within the prison, like in that circumstance.  
8 That's not making an arrest. The prison guards have the  
9 authority --

10 JUSTICE KENNEDY: And that's not a law  
11 enforcement function as contemplated by the statute, in  
12 your view?

13 MR. BUCHOLTZ: That's correct,  
14 Justice Kennedy. That -- that may involve the use of  
15 force and I -- you know, you can make an argument that  
16 -- that when you pick somebody up like in your  
17 hypothetical, that that's like an arrest at common law.  
18 There's no reason to think Congress was getting at that,  
19 was trying to cover that in the proviso.

20 Where somebody has two different distinct  
21 capacities as a matter of law, the way Bureau of Prisons  
22 guards do, and they're acting in the one and not the  
23 other, then I think that's the simple answer, is that --

24 JUSTICE SOTOMAYOR: What's the difference  
25 between the officer who punches the prisoner to get him

1 on the ground and pick him up? Would it apply to the  
2 officer who files an arrest complaint against the  
3 prisoner, and not to the security officer who just  
4 merely carries him back to his cell?

5 MR. BUCHOLTZ: Justice Sotomayor, the  
6 hypothetical is --

7 JUSTICE SOTOMAYOR: Or does some physical  
8 injury that's substantial. So the intentional assault  
9 gets treated as an exception to this only when the  
10 security officer actually files an arrest complaint? Or  
11 would it at all?

12 MR. BUCHOLTZ: Are you talking about a  
13 Bureau of Prison guard filing the arrest complaint?

14 JUSTICE SOTOMAYOR: Yes.

15 MR. BUCHOLTZ: Well, I think -- one thing to  
16 point out is the government informs the Court in its  
17 reply brief that in a situation where there has been a  
18 violation of prison rules that may also be a violation  
19 of Federal law that may also be a crime, such that, you  
20 know, in ordinary English usage, you could refer to the  
21 prison guard as conducting an investigation for  
22 violation of a Federal crime.

23 What happens is the BOP guards don't do that  
24 themselves. They call in the FBI. That's what the  
25 government says in its reply brief. So I think that

1     itself is an indication of the distinction between  
2     prison guards who are law enforcement officers as  
3     Congress has defined the term, but who are not  
4     traditional law enforcement officers, as the government  
5     seeks to define -- redefine the term, and in that  
6     capacity are not acting as law enforcement officers.

7                 JUSTICE KAGAN:   Mr. Bucholtz, I'm sure you  
8     have done this already, so I apologize, but could you  
9     just state your definition of what it means to be acting  
10    as a law enforcement officer?   What activities other  
11    than the three listed get included?

12                MR. BUCHOLTZ:   Well, Justice Kagan, it's  
13    hard to give a simple comprehensive answer that applies  
14    to all different types of law enforcement officers.   Let  
15    me start by saying that the three things that have to be  
16    included are the three things that Congress specified,  
17    and that's one of the problems with the government's  
18    definition, is that it reads out cases involves those  
19    three activities, involving, in the government's view --  
20    kinds of officers.

21                JUSTICE KAGAN:   But you don't have your own  
22    -- so what else gets in the mix?   How would you define  
23    it generally?

24                MR. BUCHOLTZ:   So -- in a case that involves  
25    one of those three things but also something else that's

1 incident to or related to those three things, we think  
2 it would probably be artificial. And you can imagine  
3 all sorts of hypos, but it might well be artificial to  
4 separate the writing of the -- of the report about the  
5 arrest and the arrest itself. So conduct incident to  
6 one of these three specified activities we think is  
7 probably covered. We also think that maybe when you are  
8 talking about a type of law enforcement officer like an  
9 FBI agent who is wearing his law enforcement hat all the  
10 time, doesn't have a second distinct capacity as a  
11 matter of law, like a military policeman or correctional  
12 officer, that maybe a broader definition is appropriate,  
13 that maybe the FBI agent who is --

14 JUSTICE KAGAN: Maybe? I mean, yes or no or  
15 when or --

16 MR. BUCHOLTZ: Well, I mean, Justice Kagan,  
17 in fairness, this case doesn't present that question,  
18 because it doesn't involve any law enforcement activity.

19 JUSTICE KAGAN: But if we're going to adopt  
20 your definition, we have to have some understanding of  
21 where it's taking us.

22 MR. BUCHOLTZ: Of course. Of course. And  
23 where I think it would be taking the Court is that as  
24 always, there could be hard cases that could arise that  
25 the lower courts would have to grapple with, but I think

1 the important concept is, that where somebody has two  
2 hats, a law enforcement capacity and some other  
3 capacity, then it's easy to draw that line, in concept.  
4 Again, there could be hard cases, but as a concept, it's  
5 easy to draw that line.

6           Where somebody doesn't have two hats, they  
7 only have one hat, like an FBI agent, and they are on  
8 the job and they are engaged in what normal people would  
9 think of as law enforcement activity, maybe that's  
10 covered. I don't really have a -- have a problem with  
11 that.

12           I think -- I think that's probably  
13 consistent with what Congress was getting at. And maybe  
14 the way to think about it is, Congress defined "law  
15 enforcement officer" with reference to the three  
16 specified kinds of exercises of law enforcement  
17 authority, but when the FBI agent is interviewing a  
18 witness or potential suspect but hasn't yet gotten to  
19 the point of arresting a person or conducting a search,  
20 you can think of that as preliminary to an exercise of  
21 one of the three specified authorities, because after  
22 all, that's what the FBI agent has the authority to do,  
23 it's what his job entails.

24           And depending on how the initial questioning  
25 goes, that might be the next step. And so it's never

1 far from the scene, when an FBI agent is engaged in what  
2 you would normally think of as law enforcement activity,  
3 that one of the three specified law enforcement  
4 activities could be in the offing.

5 That's very different when you're talking  
6 about Forest Service employees who technically meet the  
7 definition but usually are not doing anything within a  
8 million miles of what normal people would think of as  
9 law enforcement activity.

10 So I think it's important to distinguish  
11 between different kinds of people who fall within the  
12 definition. And -- I understand the Court wants to try  
13 to figure out what the implications of this  
14 interpretation would be. I think that in the prison  
15 context, the answer is clear, because there are two  
16 distinct capacities. And that's a hugely important  
17 context as a practical matter, given the point that  
18 Justice Kennedy made about the likelihood of an enormous  
19 number of claims that Congress probably didn't intend.

20 In the military police context, where there  
21 are also two distinct capacities, it's probably pretty  
22 easy to draw the line. In other cases, it will be  
23 case-by-case whether something that the Plaintiff  
24 alleges should be thought of as law enforcement activity  
25 or law enforcement officer acting as such. We don't

1 have a problem with the broad interpretation of law  
2 enforcement activity acting as such, dealing with the  
3 traditional law enforcement officer in a context that  
4 it's clear Congress intended.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.

6 MR. BUCHOLTZ: Thank you very much, Your  
7 Honor.

8 CHIEF JUSTICE ROBERTS: Mr. Paolella, you  
9 have 3 minutes remaining.

10 REBUTTAL ARGUMENT OF CHRISTOPHER J. PAOLELLA,  
11 FOR PETITIONER, APPOINTED BY THIS COURT

12 MR. PAOLELLA: Thank you, Mr. Chief Justice.

13 Let me begin by addressing Justice Kennedy's  
14 point, his question regarding the possibility of a flood  
15 of lawsuits from prisoners. I think it's important to  
16 keep in mind that right now, Pooler and Orsay are the  
17 minority rules. Most Federal courts have adopted a  
18 broad interpretation of the law enforcement proviso.

19 So if adopting a broader interpretation here  
20 would open the flood gates, the flood gates are already  
21 open, and they have been for 40 years in most of the  
22 country. And we haven't seen a flood of FTCA suits  
23 brought by prisoners, especially since the passage of  
24 the PLRA --

25 JUSTICE KAGAN: Have they also adopted the

1 government's view of what counts as an officer, or have  
2 they not?

3 MR. PAOLELLA: I -- I don't think that the  
4 issue has really been litigated in the Federal courts.  
5 It simply hasn't come up. And I think that that's an  
6 indication that it's -- it's a workable test. It's --  
7 it's not something -- that there are many, many cases,  
8 the vast majority of cases, involve individuals who will  
9 be by any reasonable definition core law enforcement  
10 officers. As far as I am aware, every Federal court to  
11 address the issue has defined correctional officers as  
12 law enforcement officers. You know -- as officers, as  
13 that term is used.

14 So I think that these things are really  
15 ultimately noncontroversial.

16 JUSTICE SCALIA: You -- you support the  
17 government's position on who's an officer, right? So it  
18 wouldn't include EPA. Is that --

19 MR. PAOLELLA: I think that the word  
20 "officer" carries some water in this statute, and it  
21 means something other than "employee."

22 JUSTICE SCALIA: Is that a yes or a no?

23 MR. PAOLELLA: Yes.

24 Justice Scalia, let me return to your  
25 earlier point about inferring congressional intent from,



1 for example, from the list of enumerated torts. And I  
2 think it's important to keep in mind that the best  
3 evidence of Congress's intent is the text of the  
4 statute. And the fundamental problem with amicus's  
5 position is that he very ably uses tools for construing  
6 ambiguous statutes to construe a statute that at its  
7 core is not ambiguous, it's precise and it's definite.

8 Now, the coverage that is created by the  
9 literal words of the statute may be debatable as a  
10 policy matter. Maybe it makes sense to include  
11 correctional officers, maybe it doesn't. But it's not  
12 absurd. And this Court's rule is when you were  
13 construing a non-ambiguous statute, Congress gets to  
14 draw that policy line, not the Court, as long as the  
15 result is not absurd.

16 And we would argue that Congress drew that  
17 policy line here. It very specifically provided that  
18 any claim based on enumerated tort by a federal law  
19 enforcement officer acting within the scope of his or  
20 her employment, is where it drew that line, that's what  
21 the statute literally says. There is no argument about  
22 that. And I think that all of the results, the parade  
23 of horrors that amicus has raised, again, may be  
24 debatable as a policy matter, but not one of them is an  
25 absurd exercise of Congress's responsibility. And as a

1 result, we would urge the Court to reverse.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 Mr. Bucholtz, this Court appointed you as an  
4 amicus curiae to brief and argue the case in support of  
5 the judgment below, and you have ably discharged that  
6 responsibility for which the Court is grateful.

7 Thank you. The case is submitted.

8 (Whereupon, at 11:26 a.m., the case in the  
9 above-entitled matter was submitted.)

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<b>A</b>				
<b>abandon</b> 20:25	9:2 10:11,12	52:13 53:7,17	23:11	6:22 9:16 12:5
<b>abandoning</b>	24:4,4,20,22	53:22 54:1	<b>apologize</b> 51:8	16:1 18:19
26:22	25:7,8 42:18	<b>agents</b> 7:10,10	<b>appeals</b> 21:4	23:23 26:23
<b>ability</b> 4:13	44:2 48:14	19:9,10,12	<b>appear</b> 16:15	27:6 28:2 35:4
<b>able</b> 22:12 33:20	51:10,19 52:6	39:17 43:7	25:11 27:10	35:5,10,13,14
<b>ably</b> 57:5 58:5	54:4	46:16,17	<b>appearance</b>	42:1 48:10,20
<b>above-entitled</b>	<b>activity</b> 7:12,18	<b>ago</b> 20:17 31:24	36:14	48:22,24 49:8
1:11 58:9	9:1 10:2 27:15	41:4	<b>APPEARANC...</b>	49:17 50:2,10
<b>absolutely</b> 42:20	33:13 34:11	<b>agree</b> 11:12	1:14	50:13 52:5,5
45:5	36:5,22 38:18	18:13 28:13	<b>appears</b> 15:7,21	<b>arrested</b> 48:25
<b>absurd</b> 57:12,15	39:8,23 43:9	31:21 32:1 41:8	31:15	<b>arresting</b> 39:5
57:25	44:6 46:14	41:22	<b>applicable</b> 47:22	53:19
<b>abuse</b> 28:5 40:22	52:18 53:9 54:2	<b>allegation</b> 36:25	48:4	<b>arrests</b> 3:21 4:10
40:23	54:9,24 55:2	<b>allegations</b> 17:14	<b>application</b> 35:6	6:18,19 8:8
<b>abused</b> 13:3	<b>acts</b> 5:2 10:22	32:5 42:9	<b>applied</b> 19:13	25:25 43:11
<b>abuses</b> 27:16	14:6 22:25 24:7	<b>alleged</b> 17:7 18:7	<b>applies</b> 18:12	46:25
28:4 43:3	30:6,8,10,15	34:14	19:1 22:25 24:7	<b>artificial</b> 52:2,3
<b>abusive</b> 9:17	30:17,21,21	<b>alleges</b> 54:24	42:7 51:13	<b>asked</b> 43:25
<b>academic</b> 12:6	32:9 47:6	<b>ambiguous</b> 57:6	<b>apply</b> 21:1 45:7	44:25
<b>Academy</b> 29:19	<b>actual</b> 32:16	57:7	50:1	<b>asking</b> 11:1
<b>act</b> 7:16 9:15	<b>add</b> 12:4,5 47:24	<b>ambit</b> 5:14	<b>appointed</b> 1:16	29:10
14:3,21 17:6	<b>addition</b> 6:9,23	<b>amicus</b> 1:21 2:10	1:22 3:8 26:10	<b>assault</b> 9:15
22:16 24:3	29:2	8:2,23 15:9,22	55:14 58:3	12:23 34:17
25:16 29:12	<b>additional</b> 11:22	16:4 19:14	<b>approach</b> 21:1	50:8
32:21 34:13,14	14:10 22:14	20:18 21:14	<b>appropriate</b> 13:6	<b>assaultive</b> 7:16
34:19 38:17	<b>address</b> 12:17	25:20 26:9	13:14 52:12	<b>assaults</b> 6:21
39:20 42:6	56:11	57:23 58:4	<b>approximation</b>	<b>assertion</b> 17:21
<b>acting</b> 3:16 7:11	<b>addressed</b> 12:17	<b>amicus's</b> 7:24	23:10	<b>assessment</b>
7:11 14:8,11,16	<b>addresses</b> 8:11	8:25 9:3 14:9	<b>area</b> 18:18	24:17
15:18,20 17:8	<b>addressing</b> 55:13	21:14 57:4	<b>areas</b> 23:11	<b>Assistant</b> 1:17
17:19 18:8,9	<b>administrative</b>	<b>amorphous</b> 21:1	<b>argue</b> 57:16 58:4	<b>assume</b> 8:14,19
25:14 26:16	4:15 5:4 41:2	<b>amount</b> 22:19	<b>argued</b> 7:1 20:18	19:11 25:4 29:5
28:19,23 29:23	<b>adopt</b> 22:9 52:19	<b>analogies</b> 39:12	32:2	<b>assumes</b> 34:18
29:24 30:18,22	<b>adopted</b> 25:4	<b>analogy</b> 39:16	<b>argument</b> 1:12	<b>assuming</b> 7:17
30:23 31:3,14	55:17,25	<b>analysis</b> 32:19	2:2,5,8,12 3:3,7	43:21
32:4,10 34:20	<b>adopting</b> 55:19	<b>answer</b> 17:3	4:17 7:24 12:19	<b>assumption</b> 22:4
36:6,7,12,21	<b>advance</b> 22:19	27:20 32:11,18	13:23 16:24	22:5
42:10 43:20	<b>advantage</b> 43:16	38:19 39:14,15	21:17,19 26:8	<b>Attorney</b> 17:11
45:23 46:7,18	<b>adversaries</b>	44:18,23 49:23	30:3 41:3,5	18:3 35:23
47:7,17 49:22	43:25	51:13 54:15	43:21 45:17	<b>Attorney's</b> 17:13
51:6,9 54:25	<b>adverse</b> 21:11	<b>answering</b> 7:20	49:15 55:10	<b>attribute</b> 28:16
55:2 57:19	<b>affirm</b> 32:3	<b>answers</b> 25:17	57:21	<b>authorities</b> 35:23
<b>actions</b> 8:4	<b>agencies</b> 43:8	<b>ANTHONY</b> 1:17	<b>arisen</b> 27:3,8	42:4 49:5 53:21
<b>activities</b> 8:11,15	<b>agent</b> 8:16 38:22	2:6 13:23	<b>arising</b> 9:15 14:5	<b>authority</b> 6:1,4,8
	39:9 40:16 52:9	<b>anticipated</b>	<b>arrest</b> 3:24 4:3	6:22 12:25 13:2

13:3 14:12 15:3 15:5 16:21 17:11 21:2 27:17 28:4 30:23 33:25 36:2 45:13 46:23 48:23 49:9 53:17,22 <b>authorized</b> 4:2 4:10 6:16 13:5 48:12 <b>authorizes</b> 35:4 <b>authorizing</b> 5:12 5:12 <b>aware</b> 22:11 56:10 <b>a.m</b> 1:13 3:2 58:8	<b>better</b> 40:7 47:4 <b>beyond</b> 11:23 <b>binding</b> 20:24 <b>block</b> 48:17,20 <b>BOP</b> 50:23 <b>botanist</b> 46:19 <b>boundaries</b> 4:24 7:7,8 <b>break</b> 22:1 <b>Breyer</b> 33:7,12 33:17 34:1 37:4 37:9,14,18,22 39:2,10,14,17 39:24 <b>brief</b> 12:14 22:15 32:2,17 50:17 50:25 58:4 <b>briefed</b> 12:13 <b>briefs</b> 7:3 45:16 <b>broad</b> 14:23 40:1 40:2 55:1,18 <b>broader</b> 42:16 44:15,19 46:11 46:12 47:14 52:12 55:19 <b>broadly</b> 8:14,20 9:2 33:6 44:1,3 <b>brought</b> 55:23 <b>Bucholtz</b> 1:21 2:9 26:7,8,11,25 28:17 29:1 30:4 31:5,20 33:11 33:18 34:7,22 35:17 36:18 37:8,14,20,23 38:7,14 39:9,14 39:21 40:9 41:7 42:19,23 43:22 44:17 47:12,25 48:21 49:4,13 50:5,12,15 51:7 51:12,24 52:16 52:22 55:6 58:3 <b>Bureau</b> 35:24 49:21 50:13	<b>C</b> <b>c</b> 2:1 3:1 24:13 <b>California</b> 12:22 12:22 <b>call</b> 50:24 <b>called</b> 11:13 17:4 <b>capacities</b> 34:23 45:23 49:21 54:16,21 <b>capacity</b> 4:15,15 4:16 8:4 10:21 14:11,17 21:2 24:10 25:15,22 25:24 29:9 30:18 34:20 36:6,8 42:6,10 43:20 51:6 52:10 53:2,3 <b>capture</b> 27:13 <b>carriage</b> 5:12 <b>carries</b> 4:5 50:4 56:20 <b>carry</b> 3:20 4:2,7 4:9,13 6:17,19 48:19 <b>carve</b> 24:14 <b>carved</b> 24:4 <b>carves</b> 24:18,19 <b>case</b> 3:4 4:25 12:8,21 16:23 17:4 18:1 21:10 21:12 23:20 25:2 27:23 29:18,19 32:6 33:15,21 36:9 36:24 37:3 41:6 41:8 47:16,21 51:24 52:17 58:4,7,8 <b>cases</b> 6:15 12:21 13:7 17:8 21:3 21:7 22:7,14 27:3,8 45:15 51:18 52:24 53:4 54:22 56:7	56:8 <b>case-by-case</b> 54:23 <b>categorizing</b> 10:16 <b>category</b> 42:16 <b>cause</b> 21:23 <b>caveat</b> 37:24 <b>cell</b> 48:17,20 50:4 <b>cells</b> 35:12,18 36:2 <b>certain</b> 24:4 33:11 36:19 <b>certainly</b> 5:2 23:20 31:21 32:1 <b>certification</b> 18:2 <b>certify</b> 18:9 <b>cetera</b> 36:3 37:11 <b>CFR</b> 49:4 <b>challenge</b> 17:23 18:2 <b>change</b> 20:16 <b>charged</b> 6:12,13 17:1 <b>Chief</b> 3:3,9 13:21 13:25 26:5,7,11 55:5,8,12 58:2 <b>CHRISTOPH...</b> 1:15 2:3,13 3:7 55:10 <b>Circuit</b> 7:11 20:22,23 26:24 27:1,2,4,12,13 28:14,14,16 <b>Circuit's</b> 27:22 <b>circumstance</b> 46:17 48:24 49:7 <b>circumstances</b> 17:14 18:6,7 42:1 <b>civil</b> 5:21 18:18	19:12 41:2 <b>claim</b> 3:14 9:15 57:18 <b>claims</b> 9:15 14:3 14:5,21 24:2 54:19 <b>class</b> 30:17 46:15 <b>clear</b> 3:13 14:4 16:20 22:24 27:1 28:3 54:15 55:4 <b>clearly</b> 29:15 <b>clerks</b> 19:16 <b>close</b> 21:24 <b>closely</b> 27:7 38:2 <b>closer</b> 5:3 7:4 <b>Code</b> 6:17 <b>colleague</b> 4:23 <b>collection</b> 24:17 <b>Collinsville</b> 27:18 45:10 <b>colloquial</b> 40:17 43:5 <b>combatant</b> 24:20 <b>come</b> 48:8 56:5 <b>comes</b> 35:21 36:14 <b>comfortably</b> 19:1 <b>coming</b> 42:14 <b>commit</b> 25:16 <b>committed</b> 3:15 11:18 23:1 34:14 <b>committing</b> 5:2 <b>common</b> 49:17 <b>commonly</b> 18:25 <b>company</b> 38:11 <b>comparators</b> 16:17 <b>complained-of</b> 5:2 <b>complaint</b> 50:2 50:10,13 <b>completely</b> 48:10 <b>complicated</b>
--	---	---	--	--

13:12 14:20 <b>comprehensive</b> 51:13 <b>concede</b> 16:21 <b>conceded</b> 12:12 <b>concept</b> 47:17 53:1,3,4 <b>conception</b> 48:5 <b>concerned</b> 9:8 <b>condense</b> 18:1 <b>conditions</b> 37:11 <b>conduct</b> 7:23 8:2 10:17 12:7 26:15 27:7,24 27:25 30:12 31:18,21 37:21 38:2 46:12,13 46:15 52:5 <b>conducted</b> 9:25 10:13 28:8,9 <b>conducting</b> 9:25 50:21 53:19 <b>conducts</b> 38:25 40:20 <b>conduct-based</b> 28:18,22,25 <b>conferred</b> 36:8 <b>confine</b> 10:21 <b>confines</b> 6:14 <b>Congress</b> 10:15 10:18,21 11:6 11:24 22:23 23:3,10,25 24:3 24:5,9,20 26:3 26:18 27:13 28:3,6 30:6,8 31:4,5,6,11 32:8,12 33:6,23 34:8,9 37:16,17 38:25 40:23 41:10,17,20,20 43:2,4,10,14 45:3,6,8,21,25 46:3,13,20,24 47:8,9 48:14	49:18 51:3,16 53:13,14 54:19 55:4 57:13,16 <b>congressional</b> 22:9 44:24 56:25 <b>Congress's</b> 57:3 57:25 <b>consequences</b> 42:13 <b>consider</b> 40:2 <b>consistent</b> 43:13 53:13 <b>constable</b> 43:6 <b>constables</b> 19:2 <b>constitutes</b> 38:18 <b>construe</b> 30:15 41:13,16,19 57:6 <b>construing</b> 57:5 57:13 <b>contact</b> 16:11 <b>contains</b> 31:10 <b>contemplated</b> 45:6 49:11 <b>context</b> 6:6,24 11:11 42:7 54:15,17,20 55:3 <b>contraband</b> 6:24 35:12 <b>contract</b> 9:12,18 11:3 <b>contrary</b> 14:13 24:25 <b>convince</b> 26:13 <b>core</b> 4:8,16 5:3 56:9 57:7 <b>correct</b> 17:15 20:5,15,22 21:13 49:13 <b>correction</b> 18:14 25:7,13 34:20 36:16 <b>correctional</b> 4:25	5:7,14,20 6:9 6:10,23 33:15 33:20,22 34:22 34:25 35:2,4,11 35:18,25 36:1,4 37:1 41:8,23 42:2 52:11 56:11 57:11 <b>corrections</b> 34:13 <b>correctly</b> 17:3 <b>correlation</b> 23:21 <b>counsel</b> 7:1 13:21 26:5 55:5 58:2 <b>country</b> 55:22 <b>counts</b> 56:1 <b>couple</b> 15:15 <b>course</b> 9:25 10:13 11:18 27:22,25 28:1 28:10 34:17 38:1 52:22,22 <b>court</b> 1:1,12,16 1:23 3:8,10 12:15,16,22,23 13:16 14:1 15:2 20:20 26:2,4,10 26:12,13 27:25 29:10,11,20 30:14 32:2,9,25 36:14,14,25 40:25 41:13,15 41:16,18 47:5 50:16 52:23 54:12 55:11 56:10 57:14 58:1,3,6 <b>courts</b> 13:10,18 21:4 27:9 52:25 55:17 56:4 <b>Court's</b> 17:24 29:24 32:19 57:12 <b>cover</b> 28:3 29:7	39:1 42:16,17 46:20 49:19 <b>coverage</b> 46:11 57:8 <b>covered</b> 8:3 10:17 27:24 30:9,10 31:19 31:21 32:13 34:5,10,18 40:18,21 42:15 43:6,15 45:19 45:24 46:1,12 46:15 47:3 52:7 53:10 <b>covering</b> 27:16 32:23 <b>created</b> 57:8 <b>creates</b> 44:20 <b>creation</b> 15:9 <b>crime</b> 50:19,22 <b>crimes</b> 34:18 <b>criminal</b> 7:9 9:1 19:3,4,11 23:24 25:22 26:1 40:15,17 41:3 <b>criteria</b> 19:7 <b>cross-referenc...</b> 10:19 <b>crucial</b> 7:24 <b>curiae</b> 1:22 2:10 26:9 58:4 <b>Custom</b> 19:12 <b>customs</b> 19:8,10 24:17 <b>C.F.R</b> 35:25	<b>dealing</b> 13:4 42:8 55:2 <b>death</b> 5:22 <b>debatable</b> 57:9 57:24 <b>deceit</b> 9:12,18 11:3 <b>decision</b> 17:24 21:11 <b>deemed</b> 5:7 <b>defend</b> 21:15 <b>defendant</b> 16:22 22:8 <b>define</b> 8:13,14 44:2 51:5,22 <b>defined</b> 8:20 9:2 15:12 29:5,6 30:17,17 32:23 51:3 53:14 56:11 <b>defines</b> 3:18 <b>defining</b> 5:11 15:13 <b>definite</b> 57:7 <b>definition</b> 7:17 7:22,22 18:21 18:25 25:5 33:23 34:8,15 34:18 35:1,10 37:15,19 38:16 38:21 40:1,7 41:10,12,16,18 41:23 42:14 43:17 45:21 46:22 47:1,8 51:9,18 52:12 52:20 54:7,12 56:9 <b>definitive</b> 16:17 <b>delegated</b> 17:11 <b>deny</b> 11:7 <b>Department</b> 1:18 29:15,22 <b>depending</b> 16:18 53:24
--	--	--	--	--

38:7,8 44:1 <b>deputy</b> 36:22 <b>describe</b> 45:16 <b>desk</b> 17:16 <b>detainees</b> 36:12 <b>detaining</b> 44:7,8 <b>detective</b> 13:9 <b>determination</b> 17:24 <b>determine</b> 18:5 <b>determined</b> 21:12 25:2 <b>determines</b> 17:14 <b>dictionary</b> 18:25 <b>difference</b> 7:24 14:18 15:15 31:1 40:13 42:24 49:24 <b>differences</b> 27:12 32:16 <b>different</b> 7:2 13:13 18:17 20:7 24:11 27:1 27:9,10 32:14 32:16 35:22 38:16 42:3,11 43:14 45:13 49:20 51:14 54:5,11 <b>difficult</b> 15:6 16:13,16 <b>directing</b> 26:3 <b>directs</b> 24:18 <b>disadvantage</b> 46:4 <b>discharged</b> 58:5 <b>discretionary</b> 24:15 <b>dismissed</b> 29:20 <b>displays</b> 10:10 <b>distinct</b> 45:22,23 49:20 52:10 54:16,21 <b>distinction</b> 7:20	7:21 51:1 <b>distinguish</b> 54:10 <b>doing</b> 16:5 19:12 19:25 40:6,6 47:2 48:1 54:7 <b>door</b> 38:24 40:20 <b>draw</b> 11:22,24 53:3,5 54:22 57:14 <b>drew</b> 57:16,20 <b>drums</b> 24:25 <b>duties</b> 20:4,11 24:17 <b>duty</b> 35:19 <b>D.C</b> 1:8,15,18,21 19:17 48:8 <hr/> <b>E</b> <b>E</b> 2:1 3:1,1 <b>earlier</b> 7:3 40:11 44:25 56:25 <b>earn</b> 22:20 <b>easiest</b> 47:16 <b>easy</b> 39:15 53:3 53:5 54:22 <b>egregious</b> 15:1 <b>either</b> 26:23 39:25 <b>elements</b> 18:21 <b>eliminate</b> 9:11 <b>embrace</b> 16:15 <b>embraces</b> 15:8 <b>employ</b> 20:8 <b>employee</b> 4:2,19 17:8,16,18 18:8 18:9 46:18 56:21 <b>employees</b> 3:24 19:15,16,16,21 43:18 54:6 <b>employer</b> 48:6 48:11,12 <b>employment</b> 3:17 10:20 12:1 12:3,9,11,20	13:1,11,18 14:8 14:16,22,24,25 15:17 17:6,9,19 23:1,24 24:8 28:20 31:7,8,12 31:23 32:5,24 33:14 36:21 57:20 <b>empowered</b> 3:20 <b>enacted</b> 26:19 <b>enactment</b> 27:19 <b>enacts</b> 32:12 <b>encapsulated</b> 42:20 <b>enclaves</b> 39:19 39:20 <b>encompass</b> 14:25 <b>ends</b> 46:9 <b>enforce</b> 49:6 <b>enforcement</b> 3:12,15,19 4:8 4:15,16 5:3,18 6:21 7:10,10,12 7:18 8:4,15 9:2 9:9,9 10:1,12 11:13 12:23 14:3,7,11,12 14:17,17,19 15:3,4,11,12 15:18,19,21 16:5,8 18:14,22 19:3,4,19 20:8 20:10,12 21:2,2 23:13,17,18 24:10,21,22 25:6,6,8,15,21 25:22,23,24 26:15,16 27:14 27:15,17 28:4 28:19,23,24 30:7,9,11,16 30:19,21,22,24 32:10,24 33:9 33:10,12,13,24	34:2,5,11,20 35:1 36:8,20,22 37:5,17 38:5,10 38:12,15,18,22 39:8,23 40:22 40:22 41:24 42:6,18 43:3,5 43:9,20 44:2,5 45:18,22,24 46:14,18,23 47:1,7,17,20 47:23 48:14 49:11 51:2,4,6 51:10,14 52:8,9 52:18 53:2,9,15 53:16 54:2,3,9 54:24,25 55:2,3 55:18 56:9,12 57:19 <b>enforcement-o...</b> 11:12 <b>enforces</b> 38:5 <b>enforcing</b> 6:13 10:13 11:19 37:7,13 40:17 <b>engage</b> 8:16 26:2 35:11,12 43:8 <b>engaged</b> 23:17 25:6,7 33:13 34:2,3,4,6,10 36:5,21 37:2 38:5 39:22 42:18 45:17 48:9,13 53:8 54:1 <b>English</b> 26:20 29:4 50:20 <b>enormous</b> 54:18 <b>entails</b> 53:23 <b>entirely</b> 11:22 32:20 35:22 <b>entomologist</b> 46:19 <b>enumerated</b> 3:14 57:1,18	<b>envision</b> 4:7 <b>EPA</b> 38:5,9,22 39:2 43:8 46:16 56:18 <b>escaped</b> 35:4 <b>escapee</b> 35:15 <b>escapes</b> 6:20 42:8 <b>especially</b> 55:23 <b>ESQ</b> 1:15,17,21 2:3,6,9,13 <b>essentially</b> 6:10 34:23 <b>establish</b> 7:6,7 <b>establishment</b> 24:19 <b>et</b> 36:2 37:11 <b>evaluating</b> 18:6 <b>evening</b> 48:18 <b>evidence</b> 15:25 27:6 28:2 39:6 43:11 46:25 57:3 <b>evoke</b> 23:24 <b>exactly</b> 8:5 29:11 40:23 <b>exaggerate</b> 27:11 <b>example</b> 4:6 5:11 5:21 6:16 12:21 19:14 39:19 47:20 57:1 <b>examples</b> 15:15 16:16 40:8,10 <b>excepted</b> 9:14 <b>exception</b> 9:10 9:21 28:6,7 50:9 <b>exclude</b> 27:7 <b>excluded</b> 12:15 28:12 <b>excludes</b> 46:16 <b>execute</b> 33:25 <b>executing</b> 15:25 43:10 46:24
--	--	--	---	---

48:1 <b>execution</b> 24:14 27:5 <b>exemption</b> 9:11 9:21,21,22 <b>exercise</b> 6:1,8 24:15 53:20 57:25 <b>exercises</b> 6:3 26:2 46:23 53:16 <b>exercising</b> 14:11 45:14 <b>exists</b> 31:25 <b>expand</b> 22:6 <b>explain</b> 17:20 22:15 <b>explains</b> 17:25 24:6 <b>explicit</b> 10:7,16 <b>explicitly</b> 6:16 31:9 <b>expressly</b> 5:20 6:22 <b>extends</b> 3:13 <b>extent</b> 28:13 43:14 <b>extrapolate</b> 22:12 <b>extra-textual</b> 11:22 <b>extreme</b> 28:16	45:3 <b>fairness</b> 52:17 <b>fall</b> 16:9 19:13 33:22 34:25 36:23 41:9 54:11 <b>falls</b> 5:2 7:17 40:6,6 <b>false</b> 9:16,16 17:15 23:23,23 28:8 <b>far</b> 20:23 33:5 54:1 56:10 <b>FBI</b> 39:9,17 50:24 52:9,13 53:7,17,22 54:1 <b>FDA</b> 43:8 46:16 <b>February</b> 1:9 <b>federal</b> 3:15,24 5:6,15,17 6:18 14:3,7,21 15:3 17:17 18:24 19:3,4,15 21:24 23:13,17,24 24:2 26:1 29:14 29:15,21,23 30:13 31:22 39:11,12,18,18 39:19 40:5 43:12 50:19,22 55:17 56:4,10 57:18 <b>fee</b> 22:19 <b>fees</b> 22:17 <b>fight</b> 22:1 43:18 <b>figure</b> 7:13 54:13 <b>files</b> 50:2,10 <b>filing</b> 22:17,19 50:13 <b>find</b> 13:18 39:12 39:15 40:4 <b>finding</b> 7:12 <b>first</b> 3:4 5:5 12:10 18:22 26:14,17 30:4	33:20 35:1 41:14 44:18,19 47:4 49:1 <b>fits</b> 47:23 <b>flavor</b> 12:7 <b>flood</b> 45:2 55:14 55:20,20,22 <b>focused</b> 37:16 43:10 45:8 46:24 <b>following</b> 35:22 42:4 <b>follows</b> 38:23 <b>follow-up</b> 38:21 <b>force</b> 4:11 5:12 6:10 13:6 49:15 <b>forces</b> 24:20 <b>foreseeable</b> 13:2 <b>forest</b> 19:15,15 19:16 20:6,10 46:17 54:6 <b>forget</b> 25:15 <b>formula</b> 26:24 <b>formulated</b> 12:15 <b>formulations</b> 27:10 <b>FTCA</b> 27:16 55:22 <b>function</b> 6:9 19:12 23:8 25:16 45:18,18 47:20,23 49:11 <b>functions</b> 24:15 <b>fundamental</b> 57:4 <b>funding</b> 29:14,16 29:16,21,23 30:13 <b>further</b> 13:19 <b>fuzzy</b> 6:2	17:12 18:3 24:6 <b>generally</b> 14:4 33:13 36:20 51:23 <b>General's</b> 4:24 7:5,25 21:9 35:24 <b>generation</b> 41:4 <b>getting</b> 27:14 49:18 53:13 <b>Ginsburg</b> 3:22 7:4 10:24 11:25 12:3 16:19 26:21,25 27:20 31:16,20 35:8 35:17 36:24 47:10,13,19 <b>give</b> 9:6,7 11:14 15:14 18:11 19:14 44:14,19 47:20,20 51:13 <b>given</b> 22:20 28:21 40:11 54:17 <b>gives</b> 33:25 41:25 <b>giving</b> 19:25 34:3 44:15 <b>go</b> 16:6 18:10 <b>goes</b> 11:23 38:23 43:24 53:25 <b>going</b> 22:2,6 30:3 32:13 33:5 37:6 37:9 40:1 52:19 <b>gotten</b> 53:18 <b>government</b> 4:17 5:6,15 17:18,21 20:21 21:3,8,22 22:7 40:14,24 41:4,15 42:13 43:4 44:3,16,18 45:16 50:16,25 51:4 <b>government's</b> 8:25 40:12,14	42:25,25 45:1 46:5 51:17,19 56:1,17 <b>grant</b> 32:21 <b>granted</b> 6:22 <b>grapple</b> 52:25 <b>grateful</b> 58:6 <b>ground</b> 50:1 <b>grounds</b> 44:12 <b>guard</b> 5:7 6:3,7 22:3 36:15 37:5 45:12 50:13,21 <b>guarding</b> 19:22 <b>guards</b> 21:25 40:3 46:1 48:19 48:23 49:5,8,22 50:23 51:2 <b>guess</b> 18:20 21:6 22:10 28:21 31:2 40:4
<hr/>				
<b>H</b>				
<hr/>				
<b>h</b> 5:19 <b>Haley</b> 17:5 <b>hand</b> 4:7 7:25 8:1 <b>handled</b> 13:15 <b>happened</b> 16:25 17:16 <b>happens</b> 13:3 34:16 36:10,11 50:23 <b>hard</b> 6:7 7:12 51:13 52:24 53:4 <b>hat</b> 42:11 52:9 53:7 <b>hats</b> 42:5 45:11 45:15,22 53:2,6 <b>hear</b> 3:3 <b>heart</b> 20:16 <b>heavy</b> 33:3 <b>held</b> 12:23,25 13:10 40:25 <b>help</b> 41:6 <b>high</b> 16:12				

<b>history</b> 45:5	<b>imprisonment</b> 9:16 23:23	<b>instance</b> 15:24	<b>involves</b> 51:18	41:5,7 42:12,19
<b>hold</b> 32:3 42:15	<b>inapplicable</b> 42:1	17:18 23:22	51:24	43:16,24 44:18
44:22	<b>inappropriate</b> 48:10	24:9,12	<b>involving</b> 51:19	44:24,25 47:10
<b>holding</b> 36:12	<b>incarcerated</b> 35:3,7 42:9	<b>instances</b> 22:3	<b>issue</b> 12:6 13:12	47:13,19 48:16
<b>Holian</b> 45:15	<b>incident</b> 16:3	24:2	13:12,16 18:6	48:21 49:2,10
<b>Honor</b> 8:18 10:3	17:7 27:7 38:3	<b>intend</b> 54:19	29:12 30:12	49:14,24 50:5,7
11:21 12:10	43:19 52:1,5	<b>intended</b> 29:7	33:16 56:4,11	50:14 51:7,12
13:19 20:5 55:7	<b>incidents</b> 16:12	34:10 43:14		51:21 52:14,16
<b>hook</b> 16:23	<b>include</b> 3:22 5:14	45:4,25 46:13	<b>J</b>	52:19 54:18
<b>hope</b> 26:13	5:20 8:15 44:7	46:20 55:4	<b>j</b> 1:15 2:3,13 3:7	55:5,8,12,13
<b>hopefully</b> 33:19	44:8,10 56:18	<b>intent</b> 10:11 22:9	24:19 55:10	55:25 56:16,22
<b>horribles</b> 57:23	57:10	44:24 56:25	<b>jail</b> 49:1	56:24 58:2
<b>hours</b> 13:4	<b>included</b> 28:6	57:3	<b>JEFFREY</b> 1:21	<b>Justices</b> 40:10
<b>hugely</b> 54:16	51:11,16	<b>intentional</b> 7:15	2:9 26:8	
<b>hypos</b> 52:3	<b>includes</b> 18:14	14:6 15:1 34:17	<b>job</b> 13:4 21:15	<b>K</b>
<b>hypothetical</b> 49:17 50:6	35:10	44:11 50:8	33:9 39:4 48:7	<b>Kagan</b> 14:14
	<b>including</b> 8:16	<b>interaction</b> 35:3	53:8,23	15:14 28:17
<b>I</b>	21:4 22:15 28:4	35:6	<b>judgment</b> 1:22	29:1 30:20 31:6
<b>idea</b> 34:1	42:16	<b>interference</b> 9:12,18 11:3	2:11 11:5,8,9	31:24 32:7 51:7
<b>ideas</b> 23:25	<b>incorporate</b> 31:8	<b>interpret</b> 32:9	26:9 32:3 58:5	51:12,21 52:14
<b>IFP</b> 22:18	<b>incorporated</b> 31:9	33:5 47:4	<b>Justice</b> 1:18 3:3	52:16,19 55:25
<b>ignore</b> 22:21	<b>incorporates</b> 10:19	<b>interpretation</b> 4:18 45:1,2	3:9,22 5:5,23	<b>keep</b> 47:8 55:16
<b>illegal</b> 38:25	<b>indication</b> 45:6	46:7 54:14 55:1	7:1,4,19 8:7,13	57:2
40:20	51:1 56:6	55:18,19	8:19,24 9:6	<b>Kennedy</b> 5:5
<b>imagine</b> 6:7 52:2	<b>individual</b> 12:24	<b>interviewing</b> 53:17	10:4,9,24,25	21:18 29:25
<b>immunity</b> 3:12	13:5 16:23	<b>investigates</b> 17:10,13	11:7,14,16,25	30:4 41:5,7
14:5 22:25	<b>individuals</b> 4:6	<b>investigating</b> 10:13 11:18	12:3 13:21,25	44:25 48:16,21
29:13 33:2,2	5:1 20:7 56:8	<b>investigation</b> 50:21	14:14 15:14	49:2,10,14
<b>implausible</b> 13:17	<b>inferring</b> 56:25	<b>investigative</b> 3:15,18 9:9	16:19 18:10,16	54:18
<b>implement</b> 24:1	<b>informs</b> 50:16	10:1,11 15:12	19:8,20,24 20:4	<b>Kennedy's</b> 55:13
<b>implications</b> 54:13	<b>initial</b> 53:24	18:21 26:16	20:13,16 21:5	<b>kids</b> 16:7
<b>implicit</b> 10:7	<b>injury</b> 50:8	30:6,9,15 33:24	21:18 23:2,6,15	<b>KIM</b> 1:3
<b>implied</b> 7:23	<b>inmates</b> 35:5	41:23 45:21	23:20 25:4,5,12	<b>kind</b> 9:24 10:16
<b>important</b> 7:21	<b>inspecting</b> 7:14	47:7	25:19 26:5,7,11	28:18 36:5
12:18 17:17	7:15	<b>involve</b> 36:24	26:21,25 27:20	46:11 47:10
36:23 37:24	<b>inspector</b> 3:23	46:14 49:14	28:17 29:1,25	<b>kinds</b> 14:14 45:9
38:20 40:13	4:12,12 7:14	52:18 56:8	30:4,20 31:6,16	51:20 53:16
42:25 53:1	40:12,16,19	<b>involved</b> 5:1 12:8	31:20,24 32:7	54:11
54:10,16 55:15	<b>inspectors</b> 41:1		33:7,12,17 34:1	<b>knocks</b> 38:24
57:2	42:17 46:16		34:12 35:8,17	40:19
<b>imported</b> 4:21			36:10,19,24	<b>know</b> 15:16
<b>imposition</b> 24:18			37:4,9,14,18	16:10 19:6,10
			37:22 38:4,7,9	23:19 25:25
			38:20 39:2,10	28:5 32:12
			39:14,17,24	37:10 38:11



40:21,22 43:2,9 46:22 49:15 50:20 56:12	36:8,20,21 37:5 37:6,8,17 38:5 38:10,12,15,18 38:21 39:7,23 40:15,17,21,22 41:24 42:6,18 43:3,5,9,12,20 44:2,5 45:18,22 45:24 46:14,18 46:23 47:1,7,15 47:17,19,22 48:4,13 49:10 49:17,21 50:19 51:2,4,6,10,14 52:8,9,11,18 53:2,9,14,16 54:2,3,9,24,25 55:1,3,18 56:9 56:12 57:18	28:25 31:8,13 31:14,16,17,18 32:13 <b>limitations</b> 15:23 <b>limited</b> 4:13 7:5 9:1 15:25 21:1 24:3 26:15 29:22 30:16 41:25 47:6 <b>limiting</b> 4:20 9:1 10:7,10 18:11 <b>line</b> 6:2 11:23 53:3,5 54:22 57:14,17,20 <b>list</b> 57:1 <b>listed</b> 14:6 51:11 <b>literal</b> 41:20 57:9 <b>literally</b> 27:4,24 28:10,11 32:20 32:22 57:21 <b>litigated</b> 12:13 17:22 56:4 <b>Litigation</b> 22:16 <b>little</b> 15:6 <b>locked</b> 37:6 <b>long</b> 20:17 57:14 <b>look</b> 4:5 5:17 12:20 21:21 23:25 25:12 26:4 37:1 42:2 45:4 <b>looked</b> 22:5 <b>looking</b> 23:7 <b>loose</b> 48:8 <b>lose</b> 22:18 <b>lost</b> 41:4 <b>lot</b> 21:25 <b>lots</b> 40:4 <b>loudly</b> 24:25 <b>lower</b> 21:3 52:25	<b>maintaining</b> 6:12 46:2 <b>majority</b> 56:8 <b>making</b> 7:20 16:1 16:11 27:6 43:11 46:25 48:9,10 49:8 <b>malicious</b> 9:16 23:23 28:4 <b>management</b> 35:24 <b>map</b> 4:24 <b>Marine</b> 29:19 <b>Marshall</b> 40:24 <b>marshals</b> 36:15 36:22 <b>Mary</b> 12:21 <b>matter</b> 1:11 5:5 15:15 21:21 24:16 49:21 52:11 54:17 57:10,24 58:9 <b>matters</b> 17:17 <b>mean</b> 5:24 11:21 15:5,23,24 22:13 23:15,17 27:10 30:24 37:6 39:11,25 52:14,16 <b>meaning</b> 8:25 <b>meaningful</b> 32:16 <b>means</b> 8:5 37:11 41:18,21 51:9 56:21 <b>meant</b> 27:4 33:6 <b>meat</b> 3:23,23 4:12 <b>meet</b> 15:17,17 15:23 19:21 54:6 <b>meets</b> 34:8 38:21 45:20 47:1 <b>Merchant</b> 29:19 <b>merely</b> 50:4	<b>merits</b> 18:1 <b>miles</b> 54:8 <b>military</b> 24:20 44:10 45:14,17 45:18,25 46:2 52:11 54:20 <b>Millbrook</b> 1:3 3:4 <b>million</b> 54:8 <b>mind</b> 36:17 55:16 57:2 <b>minimize</b> 42:13 <b>minority</b> 55:17 <b>minutes</b> 55:9 <b>miscarriage</b> 24:16 <b>misrepresenta...</b> 9:12,18 11:3 23:4 <b>mix</b> 51:22 <b>mixture</b> 19:25 <b>moment</b> 31:24 <b>moments</b> 44:4 <b>money</b> 22:20 <b>morning</b> 3:4
<b>L</b>				<b>N</b>
<b>Lane</b> 29:11,11 30:12 32:19,21 32:25 41:15 47:6 <b>language</b> 3:11 4:22 24:11,11 24:21 27:22,23 27:25 41:9,20 41:22 <b>laser</b> 43:10 46:24 <b>Laughter</b> 42:22 <b>law</b> 3:11,15,18 3:20 4:8,14,16 5:3,17 6:18,21 7:9,10,12,17 8:4,15 9:1,8,9 10:1,12,14 11:12,13,19 12:23 13:13,16 14:2,7,11,12 14:16,17,19,22 15:3,4,11,12 15:18,18,20 16:5,8,14,20 18:13,21 19:3,4 19:19 20:8,9,11 21:1,2 23:13,17 23:18,24 24:10 24:21,22 25:5,6 25:7,15,22,23 25:24 26:1,14 26:16 27:14,15 27:17 28:4,19 28:23,24 30:7,9 30:11,15,19,21 30:21,23 32:9 32:11,23 33:9 33:10,12,13,24 34:2,5,10,16 34:20,24 35:1	<b>laws</b> 6:2,4,13 24:15 32:14,17 <b>lawsuits</b> 55:15 <b>leave</b> 9:22 10:25 11:2 23:6 33:7 33:8 <b>left</b> 11:17 23:3 <b>legal</b> 35:23 45:13 48:23 <b>legislative</b> 45:5 <b>letter</b> 38:10,15 38:23,24 <b>let's</b> 4:9 8:13,14 8:19 25:4 <b>liability</b> 7:13 <b>liable</b> 23:12 <b>libel</b> 9:11,17 11:2 23:3 <b>licensed</b> 34:19 <b>light</b> 26:19,20,21 <b>likelihood</b> 22:8 54:18 <b>limit</b> 8:2,3 10:11 14:10 24:13 <b>limitation</b> 11:23 12:1 28:18,22	<b>M</b> <b>M</b> 12:21 <b>maintain</b> 35:19 36:6 49:6	<b>maintaining</b> 6:12 46:2 <b>majority</b> 56:8 <b>making</b> 7:20 16:1 16:11 27:6 43:11 46:25 48:9,10 49:8 <b>malicious</b> 9:16 23:23 28:4 <b>management</b> 35:24 <b>map</b> 4:24 <b>Marine</b> 29:19 <b>Marshall</b> 40:24 <b>marshals</b> 36:15 36:22 <b>Mary</b> 12:21 <b>matter</b> 1:11 5:5 15:15 21:21 24:16 49:21 52:11 54:17 57:10,24 58:9 <b>matters</b> 17:17 <b>mean</b> 5:24 11:21 15:5,23,24 22:13 23:15,17 27:10 30:24 37:6 39:11,25 52:14,16 <b>meaning</b> 8:25 <b>meaningful</b> 32:16 <b>means</b> 8:5 37:11 41:18,21 51:9 56:21 <b>meant</b> 27:4 33:6 <b>meat</b> 3:23,23 4:12 <b>meet</b> 15:17,17 15:23 19:21 54:6 <b>meets</b> 34:8 38:21 45:20 47:1 <b>Merchant</b> 29:19 <b>merely</b> 50:4	<b>merits</b> 18:1 <b>miles</b> 54:8 <b>military</b> 24:20 44:10 45:14,17 45:18,25 46:2 52:11 54:20 <b>Millbrook</b> 1:3 3:4 <b>million</b> 54:8 <b>mind</b> 36:17 55:16 57:2 <b>minimize</b> 42:13 <b>minority</b> 55:17 <b>minutes</b> 55:9 <b>miscarriage</b> 24:16 <b>misrepresenta...</b> 9:12,18 11:3 23:4 <b>mix</b> 51:22 <b>mixture</b> 19:25 <b>moment</b> 31:24 <b>moments</b> 44:4 <b>money</b> 22:20 <b>morning</b> 3:4

<b>Ninth</b> 7:11 26:24 27:1,12 28:13 <b>noncontrovers...</b> 56:15 <b>non-ambiguous</b> 57:13 <b>normal</b> 19:3 53:8 54:8 <b>normally</b> 19:13 19:17 54:2 <b>number</b> 21:3 22:2,7 54:19	53:15 54:25 55:3 56:1,17,20 57:19 <b>officers</b> 4:8 5:14 5:20,24 6:10,21 6:23 8:17 10:12 14:7,10 16:5,8 16:11 18:14,25 19:21 20:9,10 23:13,17 25:7 25:13,13 26:16 28:19,23,24 30:7,9,11,16 30:19,21,22 32:4,10 33:12 33:15,19,20,22 33:24 34:25 35:1,2,4,11,18 35:25 36:1,5,11 36:13,16,20 37:2,17 41:9,23 41:24 42:3,15 42:16 43:19 47:7 51:2,4,6 51:14,20 56:10 56:11,12,12 57:11 <b>officer's</b> 12:25 31:22 <b>offices</b> 17:13 <b>offing</b> 54:4 <b>Oh</b> 33:17 <b>okay</b> 25:19 29:25 39:4,20,24 <b>omissions</b> 14:6 23:1 30:6,8,11 30:15,17 32:9 47:6 <b>ones</b> 11:1 19:1 40:8 <b>one's</b> 15:3 <b>open</b> 55:20,21 <b>opening</b> 26:22 30:2 <b>operative</b> 30:5	31:12 41:11,14 <b>opposed</b> 4:16 41:3 <b>opposite</b> 20:18 <b>oral</b> 1:11 2:2,5,8 3:7 13:23 26:8 <b>order</b> 6:12 35:19 36:6 46:2 49:7 <b>ordinary</b> 26:20 29:3 39:13,16 50:20 <b>Orsay</b> 20:19 55:16 <b>Osborne</b> 17:5,24 <b>OSHA</b> 4:12 7:14 40:11,15,16,16 40:19,25 41:2 42:16 43:7 46:16 <b>ought</b> 11:22 <b>outcome</b> 21:17 <b>outrageous</b> 13:8 <b>outside</b> 6:15,19 40:6 <b>overreach</b> 22:3	32:11,19 35:19 36:1 43:21,22 44:23 46:8 49:4 <b>particular</b> 24:3 44:13 <b>particularly</b> 19:18 22:22 <b>parts</b> 22:10 44:17 <b>passage</b> 55:23 <b>passed</b> 8:6 <b>patrol</b> 16:7 39:5 39:6 <b>patrols</b> 39:22 <b>pay</b> 5:21 22:17 22:18 <b>peace</b> 5:8,10,11 5:16 <b>Pena</b> 29:11,12 32:20 41:15 47:6 <b>Pennsylvania</b> 13:7,10,16,17 <b>people</b> 13:8 19:3 34:21 36:13 37:6 39:5,18 44:7,8 46:15,16 53:8 54:8,11 <b>perfectly</b> 42:20 <b>performing</b> 23:8 <b>permit</b> 7:13 <b>permitted</b> 7:16 <b>person</b> 23:8 29:6 38:14,21 44:9 48:2 53:19 <b>personal</b> 48:2 <b>personnel</b> 44:10 <b>persons</b> 14:7 30:18 <b>Petitioner</b> 1:4,16 2:4,14 3:8 18:13 25:21 55:11 <b>Petitioner's</b> 45:1 <b>phrase</b> 14:12	19:19 31:3,4,7 <b>physical</b> 50:7 <b>pick</b> 49:16 50:1 <b>picketing</b> 13:9 <b>place</b> 15:11 35:2 49:1 <b>places</b> 39:11 <b>plain</b> 3:11 4:21 22:22 41:9,22 <b>plaintiff</b> 16:25 17:23 54:23 <b>plausible</b> 4:18 26:18 <b>play</b> 17:25 <b>please</b> 3:10 14:1 26:12 <b>PLRA</b> 55:24 <b>point</b> 23:16 31:23 32:17 35:14 36:23 41:8 44:14 50:16 53:19 54:17 55:14 56:25 <b>pointed</b> 34:25 <b>police</b> 6:10 36:11 36:11,13 39:4 39:18 46:1 54:20 <b>policeman</b> 34:2 39:4,16 45:15 45:17 52:11 <b>policeman's</b> 33:8 <b>policemen</b> 39:13 39:20 40:2,5,5 <b>policy</b> 11:5 57:10 57:14,17,24 <b>Pooler</b> 16:1 20:20,21,22 27:22,23 28:1 28:11 38:1 55:16 <b>Pooler's</b> 21:1 <b>position</b> 7:5 8:21 8:23 20:14,18 20:18,19,20	
<b>O</b>					
<b>O</b> 2:1 3:1 <b>obtain</b> 22:17 <b>obvious</b> 21:6 <b>occur</b> 8:4 10:5 18:7 <b>occurred</b> 10:22 27:17 35:9 45:9 <b>occurs</b> 14:13 37:25 43:20 <b>office</b> 4:24 7:25 21:9 23:7 25:1 <b>officer</b> 3:16,19 3:19 4:4,5,9,19 5:1,7,8,10,11 5:16,18,25 9:10 12:24 13:1,4 14:17,19 15:12 15:18,19,21 16:23,25 17:7 18:14,22,23,24 19:13,18,19 23:22 24:22 25:6 28:7 30:24 32:24 33:9 34:13,20,23 38:9,10,13,15 38:22 43:5 45:22 46:18 47:1,18,25 48:9 49:25 50:2,3,10 51:10 52:8,12					
		<b>P</b>			
		<b>P</b> 3:1 <b>PAGE</b> 2:2 <b>paid</b> 5:25 <b>Paolella</b> 1:15 2:3 2:13 3:6,7,9 4:1 5:9 6:6 7:19 8:10,18,22 9:3 10:3,6,15 11:5 11:10,15,20 12:2,10 55:8,10 55:12 56:3,19 56:23 <b>parade</b> 57:22 <b>park</b> 19:20 20:6 20:6,9 34:1 44:9 <b>parks</b> 19:22,22 <b>part</b> 9:22 25:22			

21:8,8,12,15 21:19 22:9 25:1 25:2 26:23 28:14,14,16 40:12,13 42:20 42:24 43:1 46:5 56:17 57:5 <b>possibility</b> 55:14 <b>possible</b> 11:2 32:20,22 <b>possibly</b> 38:2 <b>postal</b> 24:16 <b>potential</b> 53:18 <b>power</b> 6:23 41:25 <b>powers</b> 4:6 18:17 18:18 <b>practical</b> 54:17 <b>precedent</b> 20:24 <b>precinct</b> 36:11 <b>precise</b> 3:13 9:5 10:18 57:7 <b>precisely</b> 10:16 <b>predictive</b> 21:21 <b>preliminary</b> 53:20 <b>premises</b> 38:23 48:2 <b>present</b> 52:17 <b>presented</b> 12:14 12:16 <b>presumably</b> 43:18 <b>pretrial</b> 36:12 <b>pretty</b> 6:2 54:21 <b>prevent</b> 6:20,21 <b>previously</b> 25:1 <b>principle</b> 18:11 <b>prison</b> 5:7 6:3,7,7 6:9,11,14,15 6:18,20,25 21:22,25 22:15 36:7 37:5,9,11 40:3 45:7,12 46:1,2 48:23 49:3,5,6,7,8	50:13,18,21 51:2 54:14 <b>prisoner</b> 6:20 36:2,14 48:16 48:16 49:25 50:3 <b>prisoners</b> 6:19 6:25 21:24 22:16,20 25:14 35:3,7,18 42:9 45:3 55:15,23 <b>prisoner's</b> 48:25 <b>prisons</b> 35:5,20 35:24 49:21 <b>private</b> 13:8 <b>probably</b> 36:23 38:20 39:23 52:2,7 53:12 54:19,21 <b>problem</b> 8:20,22 9:3 19:20 44:20 46:6 53:10 55:1 57:4 <b>problematic</b> 28:2 <b>problems</b> 51:17 <b>process</b> 9:17 28:5 <b>prompted</b> 27:19 <b>properly</b> 12:17 18:8 <b>propose</b> 21:23 <b>proposed</b> 25:5 <b>proposition</b> 27:4 <b>prosecution</b> 9:17 23:24 28:5 <b>protecting</b> 25:14 <b>protective</b> 8:16 <b>protester</b> 13:9 <b>prove</b> 5:23 <b>provide</b> 16:16 37:19 43:3 <b>provided</b> 29:13 33:24 34:9 41:10,20 45:21 47:8,9 57:17	<b>provider</b> 29:16 30:13 <b>providers</b> 29:14 29:21,23 <b>provides</b> 3:12 <b>providing</b> 42:14 45:8 <b>provision</b> 11:12 24:6 30:5 41:12 41:14 <b>provisions</b> 9:14 24:12 <b>proviso</b> 4:1 11:13 14:3,4 22:23 26:15 27:14,19 30:5 31:6,9,11 31:11,15,25 32:12,23 33:23 37:15 41:11 43:1 45:5,7 47:5 49:19 55:18 <b>public</b> 16:11 <b>punch</b> 43:19 <b>punches</b> 7:15 44:9 49:25 <b>purposes</b> 5:21,22 9:20 17:6 <b>put</b> 9:23,24 33:3	53:24 <b>questions</b> 13:19 <b>queueing</b> 7:4 <b>quite</b> 6:22 14:13 <b>quote</b> 3:20 <hr/> <b>R</b> <hr/> <b>R</b> 3:1 <b>raids</b> 45:9 <b>raised</b> 57:23 <b>raises</b> 4:17 19:15 <b>range</b> 3:23 <b>rare</b> 46:17 <b>rationale</b> 16:2 <b>read</b> 29:22 32:20 32:22,25 38:2 <b>reading</b> 12:14 26:14,17,18 44:15,16,20 <b>reads</b> 51:18 <b>real</b> 40:2 <b>really</b> 4:14 27:1 27:3,28:15 29:3 29:7 40:5 42:10 53:10 56:4,14 <b>reason</b> 9:23 11:2 11:8,14,16,16 17:20 18:5 22:21 29:3 33:6 33:18 34:9 42:23 45:25 46:13 48:10,22 49:18 <b>reasonable</b> 26:18 56:9 <b>reasonably</b> 13:2 <b>reasons</b> 48:22 <b>REBUTTAL</b> 2:12 55:10 <b>recalcitrant</b> 48:19 <b>recipient</b> 38:24 <b>recipients</b> 29:17 <b>recognizes</b> 44:20 <b>recreation</b> 48:18	<b>redefine</b> 51:5 <b>redelegated</b> 17:12 <b>refer</b> 50:20 <b>reference</b> 24:5 29:4,6,21 53:15 <b>referenced</b> 22:23 <b>referred</b> 30:6,12 37:16 <b>Reform</b> 22:16 <b>regarding</b> 55:14 <b>regulation</b> 24:14 <b>regulations</b> 37:12 38:6 42:5 49:3,6 <b>Rehabilitation</b> 29:12 32:21 <b>reinforces</b> 19:7 <b>rejects</b> 17:21 <b>related</b> 52:1 <b>relatively</b> 48:5 <b>relevant</b> 17:13 29:8 30:18 47:21 <b>reliably</b> 22:12 <b>relitigate</b> 40:24 <b>remainder</b> 13:20 <b>remaining</b> 55:9 <b>remand</b> 1:20 12:17 13:15,24 <b>remedy</b> 29:14 43:3 45:9 <b>render</b> 43:1 <b>reply</b> 22:15 50:17,25 <b>report</b> 16:4 28:8 28:10 52:4 <b>represent</b> 16:22 <b>require</b> 14:10 33:4 <b>requirement</b> 9:4 10:20 31:10,25 <b>requires</b> 22:16 <b>reserve</b> 13:20 <b>resolve</b> 47:16
--	---	--	--	---

<b>respect</b> 15:4 33:15	<b>ruling</b> 13:15 21:22	6:24 8:8 12:5 15:25 18:19	4:10 35:13	<b>six</b> 3:14 14:6
<b>Respondent</b> 1:19 2:7 13:24	<hr/> <b>S</b> <hr/>	26:23 27:5 28:1 28:8,9,11 35:10	<b>sense</b> 40:16,17 43:6 46:6 48:8	<b>slander</b> 9:11,17 11:2 23:3
<b>Respondents</b> 12:13	<b>S</b> 1:21 2:1,9 3:1 26:8	35:15,18 36:2 36:25 37:3	57:10	<b>slightly</b> 7:2 27:10
<b>response</b> 7:3 31:24	<b>saying</b> 8:7 18:12 23:16 30:23	38:25 40:20 48:1,9 53:19	<b>sentence</b> 25:22 30:5 33:23	<b>sole</b> 16:22
<b>responsibilities</b> 19:5	34:4 37:18,22 38:11 42:12	<b>searches</b> 3:21 4:7,10,13,14	41:14,17 44:19 44:21 47:5	<b>Solicitor</b> 1:17 4:24 7:5,25
<b>responsibility</b> 35:20 57:25 58:6	51:15 <b>says</b> 7:11 28:19 37:6 50:25 57:21	25:25 35:12 37:2 43:11 46:25	<b>sentences</b> 41:11 <b>separate</b> 52:4	21:9
<b>rest</b> 34:3	<b>scales</b> 33:3	<b>searching</b> 39:5 48:3	<b>serve</b> 23:10 48:6 48:11	<b>solve</b> 44:21 46:5 46:6,8
<b>restraining</b> 34:21	<b>Scalia</b> 5:23 9:6 10:4,9,25 11:7	<b>second</b> 19:7 31:2 32:19 33:22	19:15,16 20:6,6 20:9,10 44:9	<b>somebody</b> 29:4 29:19 45:11,20
<b>result</b> 14:23 57:15 58:1	11:14,16 20:13 20:16 21:5 23:2	41:17 44:21 52:10	46:18 54:6	47:1 49:16,20 53:1,6
<b>results</b> 57:22	23:6,15,20 25:5 38:4,7,9,20	<b>section</b> 3:11 6:16 10:19 22:24,24	<b>services</b> 8:16,17 <b>serving</b> 36:16	<b>somewhat</b> 48:19
<b>retirement</b> 5:22	42:12,19 56:16 56:22,24	38:11	44:13	<b>sorry</b> 34:12
<b>return</b> 32:7 40:10 56:24	<b>scandal</b> 27:18	<b>sections</b> 24:11 24:12	<b>set</b> 35:22	<b>sort</b> 10:17 19:25 26:1 48:7
<b>reversal</b> 1:19 13:24	<b>scene</b> 54:1	<b>securing</b> 25:14 34:21 44:7,8	<b>sets</b> 49:5	<b>sorts</b> 11:11 29:16 29:17 43:7,8 52:3
<b>reverse</b> 58:1	<b>schemes</b> 5:20	<b>security</b> 8:17 35:20 36:6,7,13	<b>severe</b> 46:4	<b>Sotomayor</b> 7:1 7:19 8:7,13,19
<b>reviewed</b> 25:1	<b>schools</b> 16:7	44:13 49:6 50:3 50:10	<b>severely</b> 43:1 34:14	8:24 18:10,16 19:8,20,24 20:4
<b>Reynolds</b> 21:10	<b>scope</b> 3:16 10:20 12:1,3,8,11,20	<b>see</b> 13:7 16:10 21:21 22:13	<b>sexual</b> 12:23 34:14	25:4,12,19 34:12 36:10,19
<b>right</b> 11:20 12:2 20:14 23:15	12:25 13:11,18 14:8,15,21,24	33:17 40:3 43:12	<b>shift</b> 16:17	43:16,24 44:18 44:24 49:24 50:5,7,14
28:12 31:19	14:25 15:3,17 16:21 17:5,8,19	<b>seeks</b> 17:23 51:5	<b>shooting</b> 13:9	<b>source</b> 34:24
34:7 37:1 39:7	17:23 18:2,5,6 18:8,9 23:1	<b>seen</b> 55:22	<b>shoving</b> 21:25	<b>sources</b> 45:13
39:17 43:23,24	24:7 28:19 30:22 31:7,8,10	<b>seize</b> 18:19	<b>show</b> 30:1	<b>sovereign</b> 3:12 14:5 22:25 29:13
44:5 55:16	31:12,17,18,22 32:4,11,14,17	<b>seizing</b> 15:25 39:6 43:11	<b>shows</b> 10:10	<b>speak</b> 31:12
56:17	32:24 33:14 36:21 41:19	46:25	<b>side</b> 5:4	<b>specific</b> 11:23
<b>rights</b> 9:13,19 11:4	47:10,14,16,21 47:23 48:5,13 57:19	<b>seizure</b> 3:25 4:3 8:8 12:5 26:24	<b>significant</b> 6:1,4	<b>specifically</b> 22:23 24:18 57:17
<b>ROBERTS</b> 3:3 13:21 26:5,7	<b>search</b> 3:24 4:3	27:5 28:2 35:11 35:16	<b>similar</b> 8:10 18:18 24:21	<b>spectrum</b> 4:6,11
55:5,8 58:2		<b>seizures</b> 3:21	<b>simple</b> 49:23 51:13	
<b>role</b> 33:10			<b>simply</b> 18:4 19:12 21:16	
<b>roles</b> 20:7			25:2 56:5	
<b>rough</b> 23:10			<b>sitting</b> 17:16	
<b>routine</b> 35:19			<b>situation</b> 17:25 28:7 39:12 45:8	
<b>rule</b> 48:7,8 57:12			50:17	
<b>rules</b> 37:12 50:18 55:17			<b>situations</b> 47:15	

5:3 <b>square</b> 25:3 <b>stage</b> 32:6 <b>stakes</b> 16:12 <b>standards</b> 14:18 <b>start</b> 51:15 <b>state</b> 13:13,13 13:16 14:22 16:14,20 32:11 34:15 47:15 48:4 51:9 <b>statement</b> 26:22 <b>States</b> 1:1,6,12 3:5,19 4:2,4,20 5:6,9,13,14 6:2 6:5,14 14:23 15:8,16 16:21 16:24 17:10 18:23 20:13,17 21:11 23:12,22 24:24 27:16 30:7,16 32:14 32:16 43:7 47:13,14 <b>State's</b> 48:4 <b>statistics</b> 21:21 22:5,11,12 <b>status</b> 7:22 9:8 22:18 29:5,6,8 <b>status-based</b> 34:8 <b>statute</b> 4:21 8:3 9:5,5,8 14:9,13 15:7,10,22 16:15 18:22 24:1,14 25:11 26:19 28:17,22 29:12 30:1,12 32:25 38:12 46:9 49:11 56:20 57:4,6,9 57:13,21 <b>statutes</b> 5:10,16 5:17 37:12 38:6 57:6	<b>statute's</b> 4:21 <b>statutory</b> 5:19 10:8 <b>step</b> 20:25 53:25 <b>stops</b> 44:9,10 <b>strikes</b> 22:17 <b>strong</b> 21:19 <b>structure</b> 14:2 26:19 41:10 <b>studies</b> 21:20 <b>subject</b> 12:24 <b>submit</b> 30:14 38:17 <b>submitted</b> 58:7,9 <b>subsection</b> 5:19 <b>subsections</b> 24:13 <b>substantial</b> 22:19 50:8 <b>substitute</b> 28:23 31:3 <b>substituting</b> 31:13 <b>substitution</b> 29:2 <b>such-and-such</b> 38:12 <b>suggest</b> 13:14 23:2 <b>suggesting</b> 44:4 44:16 <b>suggests</b> 10:20 16:4 23:16 25:21 <b>suits</b> 21:22 45:2 55:22 <b>supervision</b> 35:25 <b>support</b> 1:22 2:10 26:9 56:16 58:4 <b>supporting</b> 1:19 13:24 <b>supports</b> 14:9 <b>suppose</b> 30:24 <b>supposed</b> 48:17	<b>Supreme</b> 1:1,12 12:22,22 <b>sure</b> 6:3 8:5,11 18:12 28:15 39:12,21 51:7 <b>surplusage</b> 47:11 <b>surpluses</b> 47:12 <b>suspect</b> 53:18 <hr/> <b>T</b> <hr/> <b>T</b> 2:1,1 <b>take</b> 4:9 20:14 20:25 24:25 27:21,23 28:11 30:1 44:3 <b>takedown</b> 35:8 <b>taken</b> 20:21 <b>takes</b> 43:17 <b>talk</b> 16:7 40:11 <b>talking</b> 16:6,18 18:24 19:2,18 20:21 23:12 25:10 33:1 50:12 52:8 54:5 <b>taxes</b> 24:17 <b>technically</b> 54:6 <b>television</b> 16:10 <b>tell</b> 7:9 18:11 20:23 37:15,17 <b>term</b> 4:3,5,19 5:10,16,17,18 15:10,12,13 16:14,14 18:24 19:13 25:10,11 41:18,21 51:3,5 56:13 <b>terms</b> 3:13 31:12 32:1 <b>test</b> 5:24,25 15:8 15:17,18,21 25:3 56:6 <b>tested</b> 27:3 <b>text</b> 10:8 14:2 21:13 22:22 23:25 24:1 26:3	43:13,15 57:3 <b>textual</b> 9:4,7 21:16,19 <b>textually</b> 26:17 <b>Thank</b> 13:21 26:5,6 42:20 55:5,6,12 58:2 58:7 <b>theory</b> 30:1,2 33:8 <b>thing</b> 16:9 26:1 50:15 <b>things</b> 5:11 13:8 14:15 15:24 16:5,6,8 23:23 26:13 27:8,11 29:7,8 31:1 35:10 37:19,25 38:1,3 43:9 47:2 51:15,16 51:25 52:1 56:14 <b>think</b> 4:18 6:6 7:3 7:21,23 8:5,7 9:23 10:6 11:10 11:11,17,20 12:11,16,19 13:17 15:2 16:10 19:7,17 19:21 20:2,11 21:7,14,15,18 21:24 22:13,21 22:22 23:5,9,13 25:24 27:20,21 29:1,2 31:13 32:2,15 33:6 34:9,16 36:4,19 37:1,14,24 38:4 38:19 39:3,22 40:7,12 41:2 42:2,15,23 44:22 45:3,11 45:20,25 46:4 46:13,20 47:4 49:18,23 50:15	50:25 52:1,6,7 52:23,25 53:9 53:12,12,14,20 54:2,8,10,14 55:15 56:3,5,14 56:19 57:2,22 <b>thinking</b> 39:3,3 39:25 <b>third</b> 8:8 20:22 20:23 27:2,4,12 27:22 28:14,16 <b>thought</b> 23:11 31:17 54:24 <b>three</b> 22:17 35:10 37:19,25 38:1 43:9 46:23 47:2 48:13 51:11,15,16,19 51:25 52:1,6 53:15,21 54:3 <b>thumb</b> 33:3 <b>time</b> 13:20 17:7 34:3,3 52:10 <b>times</b> 28:1 <b>Title</b> 6:17 <b>today</b> 26:14 <b>tools</b> 22:14 57:5 <b>topic</b> 8:12 <b>tort</b> 7:13 9:15 14:3,21 24:2 25:16 44:11 57:18 <b>torts</b> 3:14 9:24 10:17 11:11,17 14:6 15:1 23:9 23:21 28:6 57:1 <b>tour</b> 34:6 <b>tours</b> 19:25 34:3 <b>track</b> 30:1 <b>traditional</b> 4:8 40:15 43:5 48:7 51:4 55:3 <b>traditionally</b> 20:11 <b>transmission</b>
--	--	--	--	---

24:16 <b>Transportation</b> 29:15,22 <b>treated</b> 50:9 <b>tried</b> 15:23 <b>tries</b> 44:21 <b>trouble</b> 40:1 <b>true</b> 21:18 32:5 35:15 <b>trust</b> 4:23 <b>try</b> 40:9 54:12 <b>trying</b> 21:15 27:13 28:3 31:23 39:1 40:23,24 41:13 41:16 42:13 43:2 44:19 46:3 46:5,6,8 48:6 48:11 49:19 <b>Tuesday</b> 1:9 <b>turn</b> 17:12 <b>turns</b> 14:22 17:6 32:11,14 <b>two</b> 14:18 18:20 26:13 31:1 34:23 41:11 42:5 43:18 44:17 45:11,12 45:15,22,22 48:19 49:20 53:1,6 54:15,21 <b>type</b> 8:2 16:1 52:8 <b>types</b> 16:8 24:4 33:12,19 36:19 51:14 <b>typically</b> 5:15	<b>uncommon</b> 35:9 <b>undefined</b> 25:10 <b>underinclusive</b> 43:2 <b>underlying</b> 17:21 <b>understand</b> 10:24 17:2 23:22 39:11 54:12 <b>understanding</b> 14:24 43:13 52:20 <b>unequivocal</b> 33:4 <b>uniform</b> 5:13 13:4 <b>United</b> 1:1,6,12 3:4,19 4:2,4,20 6:2,4,13 15:8 16:21,24 17:10 18:23 20:13,17 21:11 23:12,22 24:24 27:16 30:7,16 43:7 <b>unleash</b> 45:2 <b>unquote</b> 3:20 <b>unusual</b> 35:14 <b>urge</b> 58:1 <b>usage</b> 26:20 29:4 50:20 <b>use</b> 4:10 5:10,12 5:16,17 13:5 24:21 28:24 31:6 49:14 <b>uses</b> 15:11 57:5 <b>usually</b> 5:7 19:25 42:6 54:7 <b>U.S</b> 6:17 17:12 36:15,22 <b>U.S.C</b> 33:21 34:23 35:21,21 36:9 41:24 42:3 42:4 45:14	29:11,11 32:19 <b>valiant</b> 21:15 <b>varies</b> 16:14 47:13 <b>various</b> 15:24 20:7 <b>vary</b> 14:23 <b>vast</b> 56:8 <b>vastly</b> 22:6 <b>vendetta</b> 48:2 <b>versus</b> 45:14 <b>vested</b> 13:1 <b>view</b> 11:25 20:22 49:12 51:19 56:1 <b>violating</b> 38:11 49:2 <b>violation</b> 50:18 50:18,22 <b>violations</b> 6:18 25:25 43:12 <b>visitor</b> 35:15 44:9 <b>visitors</b> 6:19,25 35:5 42:8	30:11 32:2 33:1 37:1 38:1 41:15 41:19 42:14 44:22 46:9,9 47:5,9,16 48:11 49:21 53:14 <b>ways</b> 25:13 <b>weapons</b> 5:13 <b>wear</b> 42:5 <b>wearing</b> 42:11 52:9 <b>Westfall</b> 17:6 <b>We'll</b> 3:3 <b>we're</b> 16:6,18 19:1 29:10 33:1 33:4 52:19 <b>we've</b> 8:19 32:1 <b>wide</b> 3:23 <b>willing</b> 8:14 <b>wish</b> 40:7 <b>witness</b> 53:18 <b>word</b> 56:19 <b>words</b> 10:1 28:11 29:24 32:22 57:9 <b>work</b> 19:17 21:25 <b>workable</b> 56:6 <b>workplace</b> 43:17 <b>works</b> 30:2 <b>world</b> 12:7 <b>worlds</b> 46:10 <b>worst</b> 46:10 <b>wouldn't</b> 27:11 28:10,24 56:18 <b>writes</b> 38:10,14 <b>writing</b> 16:4 28:9 52:4 <b>wrong</b> 46:8 <b>wrote</b> 28:8	13:22,23,25 14:15,20 15:20 16:19 17:2 18:15,20 19:10 19:23 20:2,5,13 20:15,19 21:7 22:10 23:5,9,19 25:9,17,20 26:6 31:1 <b>yard</b> 48:18 <b>yeah</b> 39:2,10,10 39:10 <b>years</b> 55:21
				<hr/> <b>1</b> <hr/>
				<b>10:25</b> 1:13 3:2 <b>11-10362</b> 1:4 3:4 <b>11:26</b> 58:8 <b>13</b> 2:7 <b>1346</b> 31:25 <b>1346(b)</b> 10:19 22:24,24 31:10 <b>18</b> 6:17 33:21 34:23 35:21,21 36:8 41:24 42:3 42:4 45:14 <b>19</b> 1:9
				<hr/> <b>2</b> <hr/>
				<b>200,000</b> 21:24 <b>2013</b> 1:9 <b>26</b> 2:10 <b>2680</b> 24:12 <b>2680(h)</b> 3:11 <b>28</b> 35:25 49:4
				<hr/> <b>3</b> <hr/>
				<b>3</b> 2:4 55:9 <b>3050</b> 6:17 33:21 34:24 35:21 36:9 41:24 42:3 45:14
				<hr/> <b>4</b> <hr/>
				<b>40</b> 55:21 <b>4001</b> 35:21 42:4
<hr/> <b>U</b> <hr/>				
<b>ultimately</b> 18:1 56:15 <b>unambiguous</b> 3:13 <b>unambiguously</b> 14:4				
	<hr/> <b>V</b> <hr/>			
	<b>v</b> 1:5 3:4 17:5			
		<hr/> <b>W</b> <hr/>		
		<b>waived</b> 29:13 <b>waiver</b> 3:12,14 22:25 24:3,6,7 33:1 <b>waivers</b> 33:2 <b>waives</b> 14:5 <b>walking</b> 44:12 <b>walls</b> 6:15,20 <b>want</b> 7:7,9 24:24 27:11 <b>wanted</b> 10:21 24:9,21 32:8 <b>wants</b> 54:12 <b>warrant</b> 41:1 <b>Washington</b> 1:8 1:15,18,21 <b>water</b> 4:5 56:20 <b>way</b> 7:6 16:17		
		<hr/> <b>X</b> <hr/>		
		<b>x</b> 1:2,7		
		<hr/> <b>Y</b> <hr/>		
		<b>Yang</b> 1:17 2:6		

<div><div>5</div><div>50 32:14</div><div>55 2:14</div><div>552 36:1 49:4</div><div>6</div><div>6:00 48:17</div></div>				
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